Volume 173 **September 2002**

MILITARY LAW REVIEW

ARTICLES

BOOK REVIEWS

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MILITARY LAW REVIEW

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ARTICLES

BOOK REVIEWS

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MILITARY LAW REVIEW

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WIELDING THE VIRTUAL GAVEL—DOD MOVES FORWARD WITH REVERSE AUCTIONS

MAJOR SUSAN L. TURLEY[1]

I. Introduction

Five hundred years before the coming of Christ, Babylonian men procured wives during an annual auction of women of marriageable age.[2] Would-be husbands bought the attractive women in traditional auctions with the lucky suitor being the highest bidder, but the less desirable females had to pay someone to marry them. The not-so-pretty women auctioned themselves off in what is probably the earliest precursor of a reverse auction in recorded history. Most likely using the prices paid for the good-looking wives as a starting point, the potential suitors competed to reduce their "bids" until hitting their bottom line—the bargain-basement dowry they would accept to marry an ugly wife. The man with the cheapest requirements took home a bride.[3]

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2. RALPH CASSADY, JR., AUCTIONS AND AUCTIONEERING 26 (1967) (citing HERODOTUS, THE HISTORIES OF HERODOTUS 77 (Henry Cary trans., 1899)).

More than 2500 years later, the public sector has turned to auctioning to buy millions of dollars of computers, natural gas, airplane parts, dishwashers, pharmaceuticals, and even goats. In this day and age, however, the auctions have a new twist—they are online and they are "reverse." As they gain in popularity, the virtual gavel can be heard banging across the Department of Defense (DOD) and the entire federal government.

Government agencies are turning to this procurement tool not only as a way of leveraging electronic commerce technology, but also because it has significant potential to shorten the contracting timeline and, perhaps more importantly, to result in dramatic cost savings for the government. Not everyone favors reverse auctions' bid for acceptance, however. A number of legal questions and concerns about reverse auctions still loom in contracting cyber-space.

This article first reviews the background of reverse auctions, starting with their history, including use by the private sector and by state and local governments. The article also provides a general description of how reverse auctions work and looks at the federal government's experience with reverse auction procurements, including an overview of the perspective of the different services. Next, the article addresses the baseline question of whether reverse auctions are legal, followed by explaining what regulatory guidance exists. The article then reviews some of the difficulties previous reverse auctions have faced, the challenges in properly implementing them, and some of the concerns among government and industry users. The article evaluates the validity of some of those criticisms, as well as assessing possible solutions to the various problems. The article next concludes that the reverse auction is a valuable procurement tool that will continue to grow in popularity. With that baseline assumption, the article then analyzes opinions regarding whether reverse auctions require additional regulatory guidance. Finally, the article asserts that while the reverse auction experience to date does not indicate a need for extensive regulation, more formalized guidelines could benefit some areas.

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3. *Id.* Neither Cassady nor, apparently, Herodotus offers any insight into the relationship between the price of a wife and the likelihood of marital bliss.

II. Reverse Auction Background

A. History of Reverse Auctions

After the Babylonians, the British apparently used a descending price auction—also known as a Dutch auction—as far back as the 1600s.[4] A descending price auction is similar to a reverse auction in that participants bid down the price from its beginning level.[5] The two formats differ, however, because a descending price auction still has the traditional goal of selling something *to the bidders*. On the other hand, in a reverse auction, the bidders are vying for the right to sell something *to the auction holder*.[6]

In the private consumer world, Priceline.com uses a reverse auction to match travelers with airline tickets, and the lending industry, automobile sales, and hotel bookings have all employed reverse auctions.[7] At least three online reverse auction Web sites will locate attorneys for legally troubled consumers,[8] and the concept has found a place in class-action suits,[9] environmental siting decisions,[10] and even medicine.[11]

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4. *Id.* at 32 (describing the mention in a seventeenth-century British catalog of a "mineing" auction). Despite its name, "mineing" had nothing to do with underground minerals. Instead, it involved potential buyers driving down an initial bid until someone called "Mine!" and took home the lot. Cassady calls "mineing" an imported version of the Dutch auction, used originally in Holland (thus the name). *Id.*

5. *Id.* at 62 ("The auctioneer determines the starting figure and quotes prices at descending intervals until someone bids the item in."). The Dutch auction is still used today to sell items ranging from art treasures in the Netherlands to fish in Israel. *Id.* at 63.

6. If one views the men as selling themselves as husbands, then the Babylonian auction truly was reverse.

7. Sari Gabay, Note & Comment, *The Patentability of Electronic Commerce Business Systems in the Aftermath of* State Street Bank & Trust Co. v. Signature Financial Group, Inc., 8 J.L. & POL'Y 179, 217 n.178 (1999) (pointing to Priceline.com's patent for reverse auctions as a "name your own price" system that has "expanded to home mortgages, hotel rooms and automobiles").

8. Ralph Warner, *Online Law: Why the Legal System Will Never Be the Same Again*, *at* http://www.nolo.com/democracy_corner/ (last visited June 24, 2002) (listing LegalMatch.com, Lawyers for Less, and SharkTank as reverse auction sites where clients post legal problems and lawyers enter bids). Lawyers for Less trumpets "1000's of qualified lawyers waiting to bid! . . . Emailed quotes save you $100's even $1000's!" Lawyers for Less, *Home Page*, *at* http://www.lawyersforless.com (last visited June 24, 2002).

9. John C. Coffee Jr., *Class Wars: The Dilemma of the Mass Tort Class Action*, 95 COLUM. L. REV. 1343, 1354 (Oct. 1995) (arguing that in mass tort class actions, defendants will seek favorable settlements by pitting plaintiffs' attorneys against themselves, a process that will degenerate "into a reverse auction, with the low bidder among the plaintiffs' attorneys winning the right to settle with the defendant").

In 1998, online auction transactions (both reverse and traditional "forward" forms) between businesses and from businesses to consumers totaled about $8.5 billion a year.[12] One analyst predicts online auctions will account for an astronomical $100 billion by 2004.[13] Local, state, and federal government currently spend less than one dollar out of every 100 online,[14] but one estimate figures online auctions could cut governmental procurement costs by at least $50 billion.[15]

Pennsylvania was the country's first governmental organization to utilize reverse auctions. Over several months in 1999, the state saved $8.5 million buying online rock salt for roads, aluminum rolls destined to become license plates, and heating coal.[16] In January 2001, San Antonio, Texas, saved forty percent in reverse auctions for equipment for its emergency services.[17] Minnesota's forty-five-minute reverse auction in June

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10. Bradford C. Mank, *Environmental Justice and Discriminatory Siting: Risk-Based Representation and Equitable Compensation*, 56 OHIO ST. L.J. 329, 363 (1995) (stating that a reverse auction is one of five ways that a state can provide compensation to those harmed by siting an environmentally unattractive facility nearby). The siting authority "offers" the facility for consideration and then locates it in whichever community steps forward to accept the facility in return for the least amount of compensation. *Id.*

11. Brian J. Caveney, *Going, Going, Gone . . . The Opportunities and Legal Pitfalls of Online Surgical Auctions*, 103 W. VA. L. REV. 591, 596-97 (2001) (describing MedicineOnline.com's reverse auction where doctors bid on a prospective patient's desired surgery).

12. GENERAL SERVS. ADMIN., FED. TECH. SERV., GUIDE TO BEST PRACTICES FOR CONDUCTING REVERSE AUCTIONS 15 (Apr. 2001 draft) [hereinafter GSA GUIDE] (quoting Carl Lehmann, *Once, Twice, Gone: Auctioning the Future—Part 1*, ELECTRONIC BUS. STRATEGIES, Oct. 14, 1999) (on file with author).

13. *Id.*

14. DAVID C. WYLD, THE PRICEWATERHOUSECOOPERS ENDOWMENT FOR THE BUSINESS OF GOVERNMENT, THE AUCTION MODEL: HOW THE PUBLIC SECTOR CAN LEVERAGE THE POWER OF E-COMMERCE THROUGH DYNAMIC PRICING 7 (Oct. 2000) (pointing out that less than one percent of the more than $1 trillion in federal, state, and local government transactions take place online), *available at* http://www.endowment.pwcglobal.com/publications_grantreports.asp. Wyld's report is an extremely valuable resource for anyone involved in government procurement.

15. *Id.* at 53. Wyld, an associate professor in the Department of Management at Southeastern Louisiana University, is deliberately conservative in his estimate, which would require governments to realize only about one-fifth of the highest savings achieved by private sector firms. *Id.*

16. Ina R. Merson, *Reverse Auctions: An Overview, The Wave of the Future or Just One More Addition to the Toolkit?*, ACQUISITIONS DIRECTIONS ADVISORY, July 2000, at 1, *available at* http://www.wifcon.com/atricle.pdf.

17. Alan Goldstein, *Agencies Move Forward with Reverse Auctions*, DALLAS MORNING NEWS, Jan. 31, 2001, at 1D.

2001 for aluminum was expected to reap five-year savings of more than $175,000.[18]

In short, "the Internet has made procurement sexy"[19]—and the DOD has not proven immune to the enticement of technology's bright lights and big city. Drawn by the lure of big-buck savings and the thrill of the Internet revolution, various government agencies have turned to reverse auctions with varying degrees of enthusiasm and success.

B. How Reverse Auctions Work

Generally, reverse auctions allow companies to bid against each other in real time. The government knows the bidders' identities, but the bidders themselves see only aliases so they do not know who they are bidding against.[20] One of the most critical steps for the government is to determine the opening price, which participants then bid down. This price generally is set using a previous baseline (such as the supply schedule from the General Services Administration (GSA)) or the Independent Government Cost Estimate (IGCE).[21] The auction lasts for a fixed period, usually thirty to sixty minutes. [22] It can be extended past that window, however, if an offeror submits a bid within the closing minutes (again, another set period, for

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18. Press Release, Minnesota Department of Administration, State Launches Reverse Auction Purchasing Initiative (June 29, 2001), http://www.admin.state.mn.us/reverse_auctions.html.

19. WYLD, *supra* note 14, at 97.

20. GSA GUIDE, *supra* note 12, at 5.

21. *See* Air Combat Command, *Reverse Auction Tacklebox, at* https://lg.acc.af.mil/lgc/RA/RA_toolkit.htm (last visited July 18, 2002) [hereinafter ACC *Reverse Auction Tacklebox*] (Lessons Learned) (describing the right starting price as "crucial" and suggesting that it be based on "sound market research, historical pricing and the government estimate"). The Air Force, however, has also let the market set the starting price as well as the ending bid in reverse auctions. Telephone Interview with Lt Col Gregory D. Snyder, Air Force Secretariat Staff Contracting Officer (Mar. 13, 2002) [hereinafter Snyder Interview].

22. Dolores M. Smith, Professor, Defense Acquisition University (DAU), "Reverse Auctions—A New Pricing Tool," Presentation at the Tenth Annual Symposium of the Tidewater Association of Service Contractors, Tidewater Government Industry Council, and Old Dominion University, slide 32 (Nov. 7, 2001) [hereinafter Smith Presentation], *available at* http://www.tasc-tgic.org/Symposium/symposium_overview.htm; *see also* Lieutenant Colonel Alan J. Boykin, Contract Policy and Implementation Division, Office of the Deputy Assistant Secretary of the Air Force for Acquisition (Contracting), "Reverse Auctioning Policy," Presentation at the Federal Acquisition Conference (Apr. 18, 2001) [hereinafter Boykin Presentation] (providing much the same information as Ms. Smith's lecture), *available at* http://www.safaq.hq.af.mil/contracting/reverseauction/.

example, the final five minutes). At this point, each participant gets an additional period to submit new bids and "literally buy themselves more time."[23]

The circumstances—the buyer, the suppliers, the type of contract, the item or service involved, the level of technology and the auction provider used—may require or allow the agency to customize the actual process somewhat. For example, in a negotiated procurement (either a best value tradeoff or lowest price technically acceptable),[24] the process may work this way: [25] The agency identifies and articulates the competitive requirement, synopsizes it, and releases the solicitation. After receiving proposals, the agency determines the competitive range and then schedules the reverse auction. (The agency also often reserves the right to award without using a reverse auction.) All the contractors who will be participating receive training before the agency conducts the auction. After the auction, the agency does a post-auction analysis and awards the contract.

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23. Press Release, Air Force Personnel Center News Service, Reverse Auction Saves AFPC Nearly $1 million (Feb. 1, 2001), http://www.afpc.Randolph.af.mil/pubaffairs/release/2001/01/ReverseAuction.htm. Last-minute bids extended this auction thirty-six times, to more than four hours. AFPC saved more than $930,000 on 833 computers and slashed costs by almost half compared to the GSA quote of $2.065 million. *Id.*

Some agencies set a final closing time—regardless of any last-minute bids submitted—on their auctions. The Naval Supply Systems Command (NAVSUP), however, does not; instead, it has a policy of unlimited overtimes because "[w]e don't want the determining factor of the lowest bid to be who has the faster ISP connection." Telephone Interview with CDR Richard Ellis, Director of Acquisitions Policy at the Naval Inventory Control Point (NAVICP), Philadelphia (Feb. 4, 2002) [hereinafter Ellis Interview]. NAVSUP avoids auctions that run on forever by requiring new bids to drop by a minimum amount, between .25 and .5% of the contract dollar value. *Id. But see infra* notes 163-68 and accompanying text (reporting problems that can arise from the lack of a final ending time).

24. The "best value continuum" includes the tradeoff process, in which the government evaluates a number of factors other than cost or price, assigning them a combined weight determined in relative importance to cost or price. GENERAL SERVS. ADMIN. ET AL., FEDERAL ACQUISITION REG. 15.101-1(b)(2) (Sept. 2001) [hereinafter FAR]. The tradeoff process allows the government to pay more for benefits it believes warrant the additional cost. *Id.* 15.101-1(c). The "lowest price technically acceptable" source selection process, on the other hand, is "appropriate when best value is expected to result from selection of the technically acceptable proposal with the lowest evaluated price." *Id.* 15.101-2(a).

25. *See* Smith Presentation, *supra* note 22, slides 10-11 (explaining all the steps that follow).

C. The Federal Government Experience

1. General Overview

Reverse auctions are attractive first and foremost because of their "dynamic pricing"—their ability to create an environment where prices can fall as much as the market will allow.[26] Government agencies have saved millions after seeing prices drop as much as fifty percent from the starting price. Another benefit has been the ability to award a contract in days, sometimes literally hours, compared to the weeks or days that award traditionally takes.[27]

In May 2000, the Navy conducted the federal government's first online reverse auction, for 756 recovery sequencers used in airplane ejection seats.[28] During the fifty-one-minute auction, the price dropped from the starting bid of $3.2 million to the final price of $2.37 million, a savings of about twenty-eight percent. After the auction closed, the Navy needed less than an hour to award the contract to the winner of the three would-be suppliers.[29]

Also in May 2000, the Army's Communications-Electronics Command (CECOM) carried out two test reverse auctions but on a much smaller scale. The CECOM bought a secure fax machine at a savings of about twenty percent off the GSA schedule, followed by a purchase of two computers for $3280, about half the price the Army would have paid through GSA.[30]

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26. *See* WYLD, *supra* note 14, at 6-7 (characterizing auctions as transforming "pricing from a static to a dynamic model" and describing the "immense potential for cost savings" in using auction technologies).

27. *See* GSA GUIDE, *supra* note 12, at 1 (claiming that the "rapid bid, re-bid and negotiation process done in real-time over the Internet" leads to a reduced acquisition cycle). The time savings may occur, however, only *after* the auction, at time of award. Upfront preparations may require as much, if not more, time than traditional acquisitions. Snyder Interview, *supra* note 21; *see also infra* note 160.

28. Bill Murray, *Navy, Army Find Savings in Initial Reverse Auctions*, GOV'T COMPUTER NEWS, June 12, 2000, at 1 (LEXIS, Industry News Publications).

29. *Id.* In November 2000, the Coast Guard also bought spare airplane parts in its first-ever online reverse auction. Eight firms submitted 291 bids for seven lots, eventually saving the Coast Guard twenty-two percent or about $300,000. Press Release, U.S. Department of Transportation, Coast Guard Holds "Reverse Auction" (n.d.), http://cio.ost.dot.gov/cio_activities/ cg_auction.html.

30. Murray, *supra* note 28.

The Defense Energy Support Center held its first reverse auction in August 2000, knocking about $425,000 off the cost of a month's worth of natural gas for Washington-area military installations. Six suppliers submitted twenty bids in thirty minutes.[31]

The following month, in September 2000, the GSA's Federal Technology Service (FTS) launched Buyers.Gov[32] as an online reverse auction provider. GSA contracted with five companies, called "enablers," to conduct the auctions.[33] After a year, the site had handled about two dozen auctions, about half for information technology products.[34]

During its inaugural month, Buyers.Gov conducted the largest online reverse auction to that point. In September 2000, the Department of Defense Finance and Accounting Service (DFAS) watched fifteen bidders compete to supply its information technology needs. Originally set to last just sixty minutes, the auction went more than four times as long as falling prices extended the deadline. Prices on the four lots dropped from twelve to forty-eight percent, and DFAS paid about $2.2 million less than the $10 million IGCE.[35] Officials gushed, as well, over the speed of the procurement, which closed out that same day.[36]

In June 2001, GSA announced plans to award a long-term, government-wide indefinite-delivery, indefinite-quantity (IDIQ) contract to execute the Buyers.Gov reverse auction program.[37] By June 2002, Buyers.Gov had apparently fallen prey—at least temporarily—to its own success. The former Buyers.Gov web link, operational as late as March 2002, by June 2002 took users to a GSA site indicating that the program had been shelved in favor of contracted-out services: "Buyers.Gov was a pilot program implementing a Web-based exchange . . . . A portion of this pilot involved a technique called 'Reverse Auction.' Because of its success, FTS has decided to award long-term contracts for Reverse Auction applications."[38]

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31. William Jackson, *DOD Saves on Reverse Auctions, Plans More*, GOV'T COMPUTER NEWS, Aug. 14, 2000, LEXIS, News Group File.

32. General Services Administration, Federal Technology Service, *Buyers.Gov, at* http://www.buyers.gov (last visited Aug. 1, 2002).

33. GSA GUIDE, *supra* note 12, at 1.

34. Richard Walker & Kevin McCaney, *Reverse Auctions Win a Bid for Acceptance*, GOV'T COMPUTER NEWS, Aug. 1, 2001, at 21, LEXIS, ASAPII Publications—Federal Public Contracts.

35. GSA GUIDE, *supra* note 12, at 18.

In November 2000, the Small Business Association (SBA) became the first government agency to procure professional services through a reverse auction. The ten-hour competition between three contractors bid-

36. Press Release, ACS Powers Federal Government's Largest-Ever Online Reverse Auction (Sept. 28, 2000) (quoting DFAS Director Tom Bloom as saying, "Our objectives were speed and value . . . . In one afternoon, we saved a considerable amount of money and accomplished a major procurement that might ordinarily take over five days."), *available at* http://www.prnewswire.com/micro/acs2. The entire process, in fact, took just more than a week. During the four days before the auction (18-21 September), DFAS received and evaluated proposals, and it issued delivery orders the next Tuesday, 26 September. General Servs. Admin., Buyers.Gov, "DFAS Auction," slide 3 (undated PowerPoint presentation) (on file with author).

In May 2001, the Internal Revenue Service claimed the "biggest ever" reverse auction title, buying 11,362 desktop computers and 16,354 notebooks through Buyers.Gov. The final price of $63.4 million was less than half the prebid estimate of $130 million. Walker & McCaney, *supra* note 34.

DFAS was so pleased with the results of its first record-breaking auction for computer equipment that it relived the experience a year later. *See* Press Release, DFAS, Reverse Auction Saves Agency Almost $2 Million (Nov. 7, 2001) (quoting Jim Lee, acting director of acquisition services, as saying that the repeat use of a reverse auction was "highly recommended"), http://www.dfas.mil/news/pr/pr02-02.pdf. On 26 September 2001, DFAS saved $1.9 million by using a reverse auction to buy more than 4000 computers and 600 monitors. Four vendors participated in the Buyers.Gov auction. Christopher J. Dorobek, *Reverse Auction Stocks DFAS*, FED. COMPUTER WK., Nov. 16, 2001, http://www.fcw.com/fcw/articles/2001/1112/web-dfas-11-16-01.asp.

37. Colleen O'Hara, *GSA Moves Ahead with Reverse Auctions*, FED. COMPUTER WK., June 6, 2001, http://www. fcw.com/fcw/articles/2001/0604/web-buyer-06-06-01.asp. An IDIQ contract requires the government to order, and the contractor to provide, some minimum quantity of supplies or services. The government often uses these types of contracts when the agency does not know in advance exactly how much of the goods or services it will need. *See* FAR, *supra* note 24, at 16.504(a)-(b).

38. General Services Administration, *IT Solutions Expertise, Reverse Auction*, *at* http://www.gsa.gov (last modified August 23, 2002) [hereinafter GSA, *IT Solutions*]. GSA awarded the reverse auction contracts—worth up to $20 million—on 25 July 2002. *See* General Services Administration, *FedBizOps.gov*, *at* http://www.FedBizOps.gov (last visited August 7, 2002) [hereinafter *FedBizOps.gov*] (Award Notice for solicitation No. 7TS-01-0001). Four companies captured contracts for "hosted" (full service) auctions: B2E Markets, Orbis Online, NB Ventures, and Computer Information Specialist. The first three also received awards for desktop auctions, in which the company provides software, training, and a help desk. GSA, *IT Solutions*, *supra.*

ding for the right to install automated doors appears to have saved the SBA about 17.6% from its the target price.[39]

And then there are the goats. In November 2000, the Army helped the Special Operations Command buy 100 goats (known in official military parlance as "caprines"). With five bidders, the price dropped from $130 a head to $100, a savings of twenty-three percent.[40]

The Defense Supply Center-Columbus (DSCC) has found that using an automated reverse auction system for purchases of less than $25,000 tends to slash procurement time from eighty-seven days to about two weeks.[41] The DSCC's own system—the DSCC Internet Bid Board System (DIBBS)—allows would-be contractors to view their competitors' bids and submit their own bids before a set closing time.[42] As of 24 July 2002, the DSCC had 136 open auctions scheduled to close in the next two weeks.

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39. PR Newswire, *FedBid.Com Conducts First Reverse Auction for the Procurement of Professional Services*, Dec. 4, 2000 [hereinafter PR Newswire, *FedBid.Com*], LEXIS, News Group File.

40. *See infra* Appendix 1 (spreadsheet giving an overview of reverse auctions conducted by CECOM) (provided by Matthew Meinert, Group Chief, Electronic Initiatives Group, Acquisition Business Process Sector, Army Communications-Electronics Command, Fort Monmouth, New Jersey). As of February 2002, the Army had conducted about fifty auctions for customers who ranged from various Army commands to the Air Force, the Marine Corps, the State Department, and the Department of Energy. Telephone Interview with Matthew Meinert, Group Chief, Electronic Initiatives Group, Acquisition Business Process Sector, Army Communications-Electronics Command, Fort Monmouth, New Jersey (Feb. 5, 2002) [hereinafter Meinert Interview]. Cumulative savings totaled more than $2.17 million, with per-auction savings ranging between seven and fifty-three percent. *See infra* Appendix 1. Additionally, in a number of cases, the Army completed the auction *and* issued the contractual instruments in less than an hour. Matthew Meinert, Group Chief, Electronic Initiatives Group, Acquisition Business Process Sector, Army Communications-Electronics Command, Fort Monmouth, New Jersey, "Reverse Auctioning," slide 23 [hereinafter Meinert Presentation] (undated PowerPoint presentation) (on file with author).

41. Mark A. Kellner, *Winning Bid Can Be Determined in One Minute with Automated Reverse Auction*, GOV'T COMPUTER NEWS, Oct. 16, 2000, at 33, LEXIS, News Group File.

42. Susan Pavilkey, *DSCC Auction Site Saving Time, Administrative Costs*, COLUMBUS BUS. FIRST, Nov. 17, 2000 (quoting Kate Minor of the DSCC), http://columbus.bcentral.com/columbus/stories/2000/11/20/focus4.html. The DSCC runs its auctions slightly differently than the usual reverse auction, leaving the bidding open for longer periods, usually two weeks. Bidders can submit quotes at any point during that time and need not necessarily beat the previous bid. DEFENSE SUPPLY CENTER-COLUMBUS, DIBBS AUCTION USERS GUIDE 3-4 (Nov. 2000) [hereinafter DIBBS AUCTION USERS GUIDE], *available at* http://dibbs.dsccols.com/ RFQ/Auction.

Since August 2000, the agency had awarded almost 4500 contracts through DIBBS.[43]

A check of active postings on FedBizOpps.gov on 18 July 2002 showed thirty-six solicitations in which the agency had, at a minimum, reserved the right to conduct a reverse auction. [44] They ranged from GSA buying natural gas for various federal buildings[45] to dry-dock and repair services for Coast Guard patrol boats[46] to laboratory animal feed and bedding for the National Institutes of Health.[47]

2. Service-Specific Perspectives

Each of the largest three services—the Army, Navy, and Air Force—are wielding the reverse auction gavel in different ways. The Navy has perhaps been the most ground-breaking, the Army the most all-encompassing, and the Air Force the most decentralized.

a. The Navy Sets Sail

The Navy began using reverse auctions after meeting with auction service provider FreeMarkets, Inc., at the request of the Navy's Chief

43. Defense Supply Center-Columbus, *DSCC Internet Bid Board System, DIBBS Auctions, at* http://dibbs.dscccols.com/RFQ/Auction/ (last visited July 24, 2002) [hereinafter *DIBBS Auctions*]. In the same period, the DSCC terminated 707 auctions because it did not receive any qualified quotes. Another 108 contracts were still awaiting award, including seventeen in which the auctions closed at least six months ago. *Id.*

44. *FedBizOps.gov, supra* note 38. Effective 1 January 2002, FedBizOpps.gov became the single point of universal electronic access to federal procurements for more than $25,000. On 4 January 2002, the Department of Commerce stopped printing the *Commerce Business Daily,* which publicized government contracting opportunities. OFFICE OF ACQUISITION MGMT., U.S. DEPT. OF COMMERCE, CBD FINAL NOTICE (n.d.), *available at* http://oamweb.osec.doc.gov/docs/CBDTerminationNotice_final.pdf.

45. *FedBizOps.gov, supra* note 38 (Solicitation No. GS-00P-02-BSC-0199).

46. *Id.* (Solicitation No. DTCG80-02-B-3FAU20).

47. *Id.* (Solicitation No. 264-02-B(GC)-0052). Archived postings from September 2000 to July 2002 showed another sixty-two procurements involving reverse auctions, including installing modular offices for the Marine Corps, more aircraft components for the Navy, tactical body armor for the State Department, and an IDIQ contract for the U.S. Postal Services (USPS) for 115 different types of pressure-sensitive labels and similar items, estimated to be worth $25 million. *Id.* (archived solicitations). In May 2002, the USPS also awarded FreeMarkets, Inc. a $4 million contract to provide reverse auction services. *Id.* (award notice for Contract No. 102594-01-H-2169M002).

Information Officer.[48] Excited by the potential reverse auctions offered, the Navy revised its already published solicitation for ejection seats to include a reverse auction as "discussions over price." During the auction's first eight minutes, the Navy got four bids—and then nothing for about the next seventeen.[49] Eventually, thirty-eight bids came in, extending the auction to fifty-two minutes.[50]

Converted by the outcome, the Navy decided to set up its own auction system.[51] The Navy secured five-year IDIQ contracts with two different companies, each providing different options and approaches to online reverse auctions—one a full-service provider, the other a "do-it-yourself" software program.[52] The Navy has made the contracts available for a fee to other DOD and federal agencies.[53]

In the first two years after the original auction, the Navy conducted about forty-three more, for agencies such as the Air Force, the Coast Guard, the Veterans' Administration, and the Defense Logistics Agency (DLA). Customers bought items ranging from light bulbs to shipboard lockers to pharmaceuticals and frozen potatoes.[54] The total "through-put" value was about $144 million, with customers saving about $37 million, or twenty-six percent, and the Navy anticipated expanding its reverse auction use.[55]

b. An Army for Everyone

The Army began investigating reverse auctions at the direction of senior Army procurement officials. A team of Army acquisition staffers worked with the Massachusetts Institute of Technology to figure out how

48. Ellis Interview, *supra* note 23. Commander Ellis assumed this position in 1999. *Id.*

49. *Id.* "Those were the longest seventeen minutes of my life," Commander Ellis remembered. *Id.*

50. *Id.*

51. *See id.* (reporting that the Navy was "ecstatic" over the results).

52. Office of the Assistant Secretary of the Navy (Research, Development and Acquisition), Acquisition and Business Management, *ABM Online: Business Practices—Reverse Auctioning*, *at* http://www.abm.rda.hq.navy.mil/revauct.cfm (last visited July 18, 2002) [hereinafter *ABM Online*].

53. *Id.*

54. Ellis Interview, *supra* note 23.

55. *Id.* ("As much as we've done, we're starting to get pressure to do more.").

the Army could integrate reverse auctions into its procurement system quickly, easily, and relatively cheaply.[56]

The Army evaluated a number of approaches and decided to go with a software- and Web-based approach rather than hiring a commercial vendor to provide auction services. The Army saw two advantages in this approach: One, it would let any contracting officer anywhere in the world conduct reverse auctions from his or her desktop. Secondly, it gave the Army the capability to do reverse auctions for smaller-dollar acquisitions, which would not be cost effective if the Army were paying a commercial reverse auction provider a hefty fee for each auction. The Army also has made the software available, for a fee, to other federal government agencies, including the Marines Corps and the Air Force. [57]

The Army has since bought everything from Patriot Missile parts to lumber to dishwashers.[58] The CECOM has made several multi-million dollar buys, including an acquisition of desktop computers that saved the customer eighteen percent by slashing $400,000 off the starting price of $2.2 million.[59]

c. Users' Choice in the Air Force

The Air Force approach has been more restrained and low-key. Before holding any reverse auctions, the Office of the Deputy Assistant Secretary of the Air Force for Acquisition (Contracting) (SAF/AQC) carried out a series of studies to evaluate how and when Air Force acquisition officials could best use this tool. The September 2000 studies were followed by a SAF/AQC guidance memo, a research paper, strategy- and policy-related guidelines, a PowerPoint briefing, and designated reverse

56. Edward G. Elgart, *Army Reverse Auctions: An E-Commerce Acquisition Tool*, PUB. MANAGER, Mar. 22, 2001, at 13. At the time, Elgart was acting deputy assistant secretary of the Army for procurement. He also has been director of the CECOM Acquisition Center since 1989. *Id.*

57. *Id.*

58. *See infra* Appendix 1.

59. *Id.*

auction points of contact (POCs) at the Pentagon, all available on the SAF/AQ Reverse Auction Web site.[60]

By June 2001, the SAF/AQ newsletter heralded the Air Force's foray into the reverse auction world, including a partnership with CECOM to use the Army's auction software.[61] The article went on to close with this:

> [The reverse auction] is shaping up to be a very interesting practice that deserves the Acquisitions community's attention. SAF/AQC has helped set the stage for the Air Force's adoption of reverse auctioning as a new tool to drive the warfighter's costs down. Keep your eyes open for more on this interesting approach.[62]

Six months later, however, the Air Force approach had changed as part of an overall SAF/AQ reorganization from five divisions to three that were aligned more closely with operational units.[63] Part of that realignment transferred responsibility for implementing e-commerce to Gunter Air Force Base, Alabama. The Air Force made that move "not to diminish reverse auctions" but rather to refocus SAF/AQ on overarching policy determinations instead of "hands on" acquisitions activities.[64]

Additionally, after a test partnership using the Army's reverse auction programs, the Air Force was not convinced that this type of a service-wide agreement was cost effective, given the approximately twenty reverse auctions it had done.[65] Because other options existed (for example, using the Navy's or GSA's enablers or other providers for a per-auction fee), the Air Force decided to allow each contracting office to determine if, when, and

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60. Office of the Deputy Assistant Secretary of the Air Force for Acquisition (Contracting), *Reverse Auction*, *at* http://www.safaq.hq.af.mil/contracting/reverseauction/ (last modified Apr. 24, 2001) [hereinafter SAF/AQC *Reverse Auction*].

61. *See Air Force "Aims High" with Reverse Auctioning Strategy*, AEROSPACE ACQUISITION (Office of the Ass't Sec'y of the Air Force (Acquisition)), May/June 2001, at 3, 7 [hereinafter *Air Force "Aims High"*].

62. *Id.* at 7.

63. Snyder Interview, *supra* note 21.

64. *Id.* Transferring the e-commerce workload to Gunter was a logical move because Gunter already was the Air Force "center for excellence" for computer-related activities. While a second lieutenant at Gunter has day-to-day responsibility for reverse auctions, SAF/AQ has retained a POC responsible for reverse auction policy and retains overall e-commerce program direction "for the end-to-end vision and standard procurement system." *Id.*

65. *Id.*

how to use reverse auctions. "What we wanted to do was say, this is a tool you can use" if it fits into the organization's acquisition planning.[66]

III. Legal Framework

Despite thousands of years of private-sector auction experience, the federal government is a "johnny-come-lately" to the reverse auction block. Until five years ago, auctions and federal government procurement were an illegal combination. Regulatory changes now seem to permit auctions (although some disagree), but the specific guidance is still evolving.

A. Are Reverse Auctions Legal?

Five years ago, the Federal Acquisition Regulation (FAR) flatly outlawed negotiated procurements using auctions or "auctioning techniques."[67] The ban may have been due, at least in part, to opposition from industry sources who disliked the lowest-price emphasis and the competitive edge auctions gave to buyers.[68] A 1997 rewrite to the FAR Part 15 eliminated the auction prohibition, although it still forbids releasing one offeror's price to any others without advance approval.[69] That ban, however, is a general one—not one specifically aimed at auctions. The current FAR is simply silent on reverse auctions.

Closely intertwined with this issue is the Procurement Integrity Act (PIA), which prohibits anyone acting on the government's behalf from

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66. *Id.* That shift, however, means that the local unit pays for the auction enabler or provider's costs, rather than having the auctions centrally funded as they were under the Army agreement. *Id.* This can prove rather tricky because the auction services are just that—services. Thus, in some instances, they cannot be paid for with the same procurement dollars the organization is using to buy its commodities, due to fiscal rules. *Id.*

67. Steven Kelman, *Auctions the Next Tool for the Federal Buyer*, FED. COMPUTER WK., July 26, 1999, http://www.fcw.com/vcw/articles/1999/fcw_072699_831.asp. Kelman was administrator of the Office of Federal Procurement Policy (OFPP) at the Office of Management and Budget (OMB) from 1993-97. *Id.*

68. *Id.*

69. *Id*; *see also* FAR, *supra* note 24, at 15.306(e)(3) ("Government personnel involved in the acquisition shall not engage in conduct that . . . [r]eveals an offeror's price without that offeror's permission."); Timothy D. Palmer et al., *Can The Government Go Fast Forward on Reverse Auctions?*, GOV'T CONTRACTOR, July 12, 2000, at 1, 4 (concluding that "the propriety of auction techniques under the new FAR Part 15 appears to turn on obtaining advance consent from all participants to release bids").

knowingly disclosing a contractor's bid or proposal before the contract award.[70] The PIA "could be interpreted as forbidding auctions, although this clearly was not the intent of the legislation."[71]

Further complicating the picture is FAR 14.202-8, dealing with electronic bids. This section allows contracting officers to authorize electronic bid submission in sealed bid procurements and arguably permits reverse auctions.[72] Because Part 14's provisions were "still largely written with traditional (that is, paper-based) procedures in mind," however, a strict literal interpretation of Part 14 is problematic.[73]

For example, FAR Part 14 outlines a scheme of one bid per offeror—nothing in the section envisions or sanctions *successive* bids.[74] Reverse auctions do not quite fit a model in which sealed bids are to be "submitted at an exact time, opened at an exact time and safeguarded in the interim."[75]

Given the FAR's absence of express authorization, are reverse auctions lawful? Despite the FAR revision, some skeptics assert that reverse auctions border on illegality, at a minimum.[76] The American Bar Associ-

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70. 41 U.S.C.S § 423(a) (LEXIS 2002); *see also* FAR, *supra* note 24, at 15.608(a) ("Government personnel shall not use any data . . . or other part of an unsolicited proposal . . . in negotiations with any other firm unless the offeror is notified of and agrees to the intended use.").

71. Kelman, *supra* note 67.

72. *See* Smith Presentation, *supra* note 22, slide 37 (opining that this section "[p]rovides the flexibility to use" reverse auctions).

73. Palmer et al., *supra* note 69, at 6.

74. *See* AIR FORCE MATERIEL COMMAND, AIR FORCE MATERIEL COMMAND ATTORNEY'S GUIDE TO ELECTRONIC COMMERCE 37 (Sept. 2001) [hereinafter AFMC ATTORNEY'S GUIDE] (stating that sealed bidding procedures "were never designed to accommodate iterative rounds of bids").

75. Palmer et al., *supra* note 69, at 6; *see also* Scott M. McCaleb, *Reverse Auctions: Much Ado About Nothing or the Wave of the Future?*, PROCUREMENT L. ADVISOR, Sept. 2000, at 3 (asserting that it is "doubtful" that reverse auctions meet the requirements of a FAR Part 14 procurement).

76. *See, e.g.*, Bob Little, *Legal Questions Loom for Reverse Auctions*, GOV'T COMPUTER NEWS, Aug. 1, 2000, at 37, LEXIS, News Group File (contending that case law can be interpreted to prohibit contract activity in which offerors know "the previous bid of another," as in a reverse auction); Stephen M. Ryan, *Reverse Auctions Need Regulatory Guidance*, GOV'T COMPUTER NEWS, Aug. 14, 2000, at 22, LEXIS, News Group File (declaring that the law is unclear on reverse auctions' legality); Robert Antonio, *Do Reverse Auctions Violate FAR 15.307(b)?*, WHERE IN FEDERAL CONTRACTING?, July 24, 2000 (maintaining that the reverse auction fails to satisfy all FAR requirements), *at* http://www.wifcom.com/anallegal.htm.

ation (ABA) has called for an unequivocal FAR pronouncement that reverse auctions are legal when done properly.[77]

No court has ruled specifically on reverse auctions, although several have addressed auctions in general.[78] To date, there have been only two reported reverse auction protests—both involving the Navy's attempts to acquire moving services. In both, the Navy voluntarily took corrective action, and so the General Accounting Office (GAO) denied the protests.[79]

In the second case, however, the GAO evidently felt compelled to point out, in the opinion's final footnote, that the decision did "not address the more general question of the propriety of reverse auctions, since that is not at issue in the protest."[80] Is that an invitation for someone to raise the issue of whether reverse auctions are proper—a veiled hint that GAO thinks they are not? Or is it simply one of those throwaway remarks that sometimes are made in dicta (and then overanalyzed by lawyers who read way too much into them)?

If the footnote is GAO's oblique signal that it believes reverse auctions are unlawful, GAO is taking the minority view. The DOD General Counsel's office has advised DOD acquisition officials that current statutes

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77. Letter from the Public Contract Law Section of the American Bar Association, to the General Services Administration (Jan. 5, 2001) [hereinafter ABA Letter] (calling for explicit FAR guidance that properly conducted reverse auctions are permitted), http://www.abanet.org/contract/federal/regscomm/ecomm_003.html.

78. *See, e.g.*, DGS Contract Serv., Inc., 43 Fed. Cl. 227 (1999) (upholding auctioning techniques). The court said, "Construing (FAR) section 15.306(e), an agency theoretically could conduct an auction and disclose prices of each offeror in the competitive range provided it obtained their consent." *Id.* at 239. *See also* Thomas F. Burke, *Online Reverse Auctions*, WEST GROUP BRIEFING PAPERS, Oct. 2000, at 1 (noting that the General Accounting Office (GAO) has repeatedly found "nothing inherently illegal" in procurements through auctions but instead has criticized the "unfair competitive advantage" gained through disclosing offerors' proposals).

79. Pacific Island Movers, Comp. Gen. B-287643.2, July 19, 2001, 2001 CPD ¶ 126 (upholding the Navy's decision to cancel the reverse auction and obtain revised price proposals because of software malfunctions and other deficiencies); Royal Hawaiian Movers, Inc., Comp. Gen. B-288653, Oct. 31, 2001, 2001 CPD ¶ 182 (ruling that obtaining revised price proposals was an appropriate solution to resolve an ambiguous solicitation); *see also infra* notes 161-72, 178-80 and accompanying text (discussing the cases in more detail).

80. *Royal Hawaiian Movers*, 2001 CPD ¶ 182, at 4 n.4.

and regulations allow reverse auctions,[81] and the bulk of other commentators seem to agree.[82]

Yet all the opining that reverse auctions are legal does not really answer the question of *why* that is so. To resolve the issue, one must view reverse auctions in the context of the evolving laws and statutes governing acquisitions and electronic commerce in the federal government—for example, the Federal Acquisition Streamlining Act of 1994 (FASA)[83] and the Federal Acquisition Reform Act and the Information Technology Management Act (the latter two known as the Clinger-Cohen Act of 1996). [84] These acts, and the resulting FAR revisions, signaled a drastic shift in policy: [85] "Previously, the intent of the FAR was that nothing could be done

81. AM. MGMT. SYS., INC. & FREEMARKETS, INC., ONLINE AUCTIONS IN THE PUBLIC SECTOR: A POWERFUL NEW TOOL FOR REDUCING ACQUISITIONS COSTS 5 [hereinafter AMS & FREEMARKETS] (citing a Mar. 24, 2000 letter from David Oliver, Undersecretary of Defense for Acquisition and Technology, to Sen. Rick Santorum, R-Pa.), http://www.amsinc.com/FedeProcurement/pdfs/OnlineAuctionsinthePublicSector.pdf.

82. *See, e.g.*, AFMC ATTORNEY'S GUIDE, *supra* note 74, at 35 ("If properly structured, reverse auctions comply with all procurement statutes and regulations."); Captain Mike Darby, Naval Supply Systems Command, "Reverse Auctions," Presentation at the Defense Acquisition University Lunchtime Series, slide 13 (Oct. 3, 2000) [hereinafter Darby Presentation] (concluding that reverse auctions are "permissible" contracting techniques), http://www.dsmc.dsm.mil/contracting/FAIDAU/racop/documents/docs_top.htm; Boykin Presentation, *supra* note 22, slides 18, 23 (asserting that reverse auctions require no "enabling FAR coverage" nor do they conflict with statutory requirements for full and open competition); Merson, *supra* note 16, at 11 (reporting that most legal opinions have found properly conducted reverse auctions to be lawful).

83. Pub. L. 103-355, §§ 9001-9004, 108 Stat. 3243, 3399 (Oct. 13, 1994).

84. Pub. L. 104-106, § 4304, 110 Stat. 659 (Feb. 10, 1996).

85. *See* Defense Systems Management College, *Federal Acquisition Regulation (FAR) Changes*, *at* http://www.dsmc.dsm.mil/jdam/contents/far_rewrite.htm (last visited Mar. 21, 2002) [hereinafter DSMC, *FAR Changes*] (asserting that the FAR—including Part 15—was significantly rewritten in response to these acts); AFMC ATTORNEY'S GUIDE, *supra* note 74, at 6 (discussing the amendment's impact). Pages 3-20 of the AFMC guide also provide an excellent discussion of the evolution of electronic commerce in the federal government.

unless it was expressly permitted; circumstances that were simply not mentioned were automatically prohibited."[86]

The FASA and the Clinger-Cohen Act, however, led to the discretion-enhancing philosophy found in the FAR's "Statement of Guiding Principles for the Federal Acquisition System," which states:

> The role of each member of the Acquisition Team is to exercise personal initiative and sound business judgment in providing the best value product or service to meet the customer's needs. In exercising initiative, Government members of the Acquisition Team may assume if a specific strategy, practice, policy or procedure is in the best interests of the Government and is not addressed in the FAR, nor prohibited by law (statute or case law), Executive order or other regulation, that the strategy, practice, policy or procedure is a permissible exercise of authority.[87]

The FAR's guiding principles work hand-in-hand with the Office of Federal Procurement Policy (OFPP) Act.[88] The OFPP Act requires agencies to use electronic commerce in procurement "to the maximum extent that is practicable and cost effective."[89] In implementing this mandate, the FAR grants agencies "broad discretion" to choose which methods they use.[90]

Read together, these statues, at a minimum, permit reverse auctions and arguably encourage using new tools such as reverse auctions. Any agency that does not at least explore reverse auctions for procurements is neither maximizing electronic commerce usage, nor exercising initiative to find new ways to meet customers' needs.

Additionally, case law on the extent of the PIA's limitations seems to back up the contention that Congress did not intend the law to ban disclosure in a reverse auction context. In *Pikes Peak Family Housing, LLC v. United States*, the court reviewed the act's legislative history to conclude "that the Act prohibits not *all* disclosure of procurement-related informa-

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86. DSMC, *FAR Changes*, *supra* note 85.

87. FAR, *supra* note 24, at 1.102(d).

88. 41 U.S.C.S. §§ 401-436 (LEXIS 2002).

89. *Id.* § 426(a). Electronic commerce is defined as "electronic techniques for accomplishing business transactions, including World Wide Web technology . . . and electronic data interchanges." *Id.* § 426(f).

90. FAR, *supra* note 24, at 4.520(b).

tion, but rather, disclosure 'other than as provided by law'."[91] While the statute's actual language was a last-minute compromise that lacked explicit legislative commentary, the court thought that the law was "obviously directed" at situations where procurement officials leak confidential information in hopes of receiving some type of benefit in return.[92] A reverse auction, where all the bidders agree up front to releasing their bids, does not implicate these concerns.[93]

It does, however, raise the question of what constitutes "consent" to release. Those who participated in GSA's Buyers.Gov auctions signed a written agreement authorizing disclosure of their bids to the auction enabler before the auction starts.[94] In some reverse auctions, however, the only consent the government obtains is implied through the bidders' auction participation. For example, sample solicitation language from the Navy states: "Submission of a proposal in response to the solicitation will be considered consent by the Offeror to participate in the CBE [competitive bidding event] and to reveal their prices in anonymity during the CBE."[95]

No regulatory guidance addresses the issue of whether consent *implied by* participation is sufficient.[96] Equally unsettled is the question

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91. 40 Fed. Cl. 673, 680 (1998).

92. *Id.* at 681 (quoting the legislative history as describing the act's purpose as "the abatement of 'insider trading of sensitive procurement information'" and combating procurement fraud).

93. *See* AFMC ATTORNEY'S GUIDE, *supra* note 74, at 36 (stating that dicta from the Court of Federal Claims and GAO precedent seem to support the position that the government does not violate the PIA if it reveals a bidder's price after the bidder authorizes disclosure in advance).

94. General Services Administration, Federal Technology Service, *Buyers.Gov* [hereinafter *Buyers.Gov*] (Questions and Answers section, No. 56) (on file with author).

95. Air Force Materiel Command Operational Contracting, *Reverse Auctioning*, *at* https://www.afmc-mil.wpafb.af.mil/HQ-AFMC/PK/pko/revauctn/ramain.htm (last modified Jan. 23, 2002) [hereinafter AFMC *Reverse Auctioning*] (providing a sample Section L—Instructions, conditions and notices to offerors or quoters—from the Navy). Army sample specifications similarly advise: "Submission of an offer during the reverse auction will be considered consent by the offeror to participate in the reverse auction and to reveal their prices in anonymity." *Id.* (offering language used by CECOM and the 48th Contracting Squadron, RAF Mildenhall, England, for an information technology (IT) reverse auction in September 2000).

96. The GAO has ratified the use of consent through participation. *See* Pacific Island Movers, Comp. Gen. B-287643.2, July 19, 2001, 2001 CPD ¶ 126 (holding that revealing bidders' prices was fair because the offerors agreed to disclosure by participating in the auction).

of whether consent *required for* participation is freely and voluntarily given.[97] "To the extent that the PIA, or for that matter, the Trade Secrets Act, 18 U.S.C. § 1905, gives a contractor legal rights to protect proprietary information, it is unclear whether a contractor's 'consent' to waive confidentiality in an online auction setting would be enforceable if challenged."[98]

In fact, very few reverse auction questions are answered by explicit, formalized guidance. So, as reverse auctions began to make a bang in government procurement, the issue of whether regulatory guidance was needed began to surface. In the fall of 2000, OFPP officials solicited input from the commercial, governmental, and educational communities to help craft reverse auction policy. At the time, OFPP said it planned to issue the guidance by the spring of 2001.[99] As of August 2002, it had not yet done so.

In October 2000, the Defense Acquisition Regulations (DAR) Council and the Civilian Agency Acquisition Council sought input on FAR guidance. But instead of following customary practice of publishing a proposed rule for public comment,[100] the councils took the unusual step of asking whether any guidance on using reverse auctions was even needed, and, if so, how it should be handled.[101] Acting on behalf of the DOD, the National Aeronautics and Space Administration, and GSA, the councils stated that they recognized that not everyone wanted to see formalized guidelines. The councils acknowledged other opinions as well, including allowing agencies to set their own guidance through policy, that the agencies' reverse auction experience is still too limited to provide an adequate basis for developing useful guidance, and that the FAR does not need to

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97. *See* AFMC ATTORNEY'S GUIDE, *supra* note 74, at 36 (questioning whether "requiring consent as a condition to participate in the acquisition suffices to constitute voluntary consent").

98. Palmer et al., *supra* note 69, at 4.

99. Tanya N. Ballard, *OMB to Issue New Rules on Reverse Auctions*, GOV'T EXECUTIVE, Nov. 20, 2000, http://www.govexec.com/dailyfed/1100/11200t2.htm.

100. *See* FAR, *supra* note 24, at 1.501-2(b) (directing the councils to publish proposed significant revisions to the FAR to provide interested parties the chance to submit written comments).

101. Reverse Auctioning Notice, Department of Defense, General Services Administration, National Aeronautics and Space Administration, 65 Fed. Reg. 211 (Oct. 31, 2000) (seeking comments on "whether there is a need for guidance on the use of reverse auction techniques, and, if so, how it can be most effectively communicated").

address reverse auctions because "FAR 1.102(d) permits any technique that is not expressly prohibited."[102]

Besides asking whether agencies needed guidance, and, if so, the form it should take, the councils suggested a number of topics for comments. These topics included determining when reverse auctions are appropriate, auction ground rules, how to do best value, cost-technical tradeoffs in connection with an auction, ensuring small business participation, the pros and cons of reverse auctions (for both the government and contractors), and possible hurdles to conducting auctions.[103]

The FAR councils received thirty-eight comments regarding reverse auctions.[104] In April 2001, the DAR Council met to review them and decided to do . . . nothing. Why? Because even though "the majority of the respondents believed that FAR guidance would be helpful," the DAR Council simply could not agree on *any* revision or proposal: "Every change caused a problem for someone at the table. The principal concern was that nothing be included that might interfere with what agencies are already doing in this area."[105] Inaction (in the form of a recommendation to the OFPP that the case be closed because it was premature to develop FAR guidance) was the only action that could garner a consensus.[106]

B. Existing Guidance

Because the FAR councils opted against regulatory revisions, the reverse auction community must rely on existing guidance that fluctuates considerably in both quality and quantity. The Office of the Secretary of Defense, Acquisition, Technology, and Logistics (Acquisition Initiatives) gives reverse auctions a passing mention in its *Commercial Items Handbook*.[107] The Army has added references to reverse auctions in its service supplement to the FAR regarding blanket purchase agreements (BPAs).[108]

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102. *Id.*

103. *Id.*

104. DEFENSE LOGISTICS AGENCY, DLA DAR COUNCIL ACTIVITY REPORT (Apr. 25, 2001) (referencing Case 2001-010), *available at* http://www.dla.mil/j-3/j-336/logisticspolicy/DARcouncil.htm (DAR Council Policy Member Web Page).

105. *Id.*

106. *Id.* The council did note, however, that its recommendation was only advisory and that the OFPP might not agree with it. Additionally, the council realized it might need to revisit the issue if future events indicated a renewed need for regulatory guidance. *Id.*

The Army's discretionary Source Selection Guide also covers reverse auctions in Appendix I.[109]

The Air Force put out mandatory reverse auction guidance in a February 2001 memorandum from SAF/AQC.[110] The Air Force Materiel Command (AFMC) offers an *Attorney's Guide to Electronic Commerce* with a few pages on reverse auctions.[111]

A variety of sites scattered across the Web offer guidance ranging from minimal (a page or two)[112] to extensive.[113] The sites are not easy to locate if one does not know the Internet addresses, however, and there is no single consolidated location offering definitive guidance for those involved in DOD contracting (on either the government or the supplier side).

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107. OFFICE OF THE SEC'Y OF DEF., ACQUISITIONS, TECH. AND LOGISTICS (ACQUISITION INITIATIVES), COMMERCIAL ITEM HANDBOOK 13 (Nov. 2001) [hereinafter OSD HANDBOOK] (advising that commercial item procurements can use reverse auctions to determine a fair and reasonable price and to ensure competition), *available at* http://www.acq.osd.mil/ar/doc/cihandbook.pdf.

108. U.S. DEP'T OF ARMY, ARMY FED. ACQUISITION REG. SUPP. 5113.301-1(j)(1), 5113.303-2(a)(3) (Oct. 2001) (stating a preference for establishing prices between BPA holders using reverse auctions).

109. U.S. DEP'T OF ARMY, ARMY SOURCE SELECTION GUIDE app. I, at 76 (June 2001) [hereinafter ARMY SOURCE SELECTION GUIDE], *available at* http://acqnet.saalt.army.mil/library/default.htm.

110. Memorandum from Brigadier General Darryl A. Scott, Deputy Assistant Secretary (Contracting)/Assistant Secretary (Acquisition), U.S. Air Force, to ALMAJCOM-FOA-DRU (CONTRACTING), subject: Reverse Auction (RA) Guidance (19 Feb. 2001) [hereinafter Scott Memo], *available at* http://www.safaq.hq.af.mil/contracting/reverseauction/. SAF/AQC issued the guidance after reviewing corporate use of reverse auctions, evaluating commercial reverse auction providers, and analyzing reverse auctions to see if they conflicted with current regulatory and statutory rules. *Id.*; *see also supra* note 60 and accompanying text.

111. AFMC ATTORNEY'S GUIDE, *supra* note 74, at 35-37.

112. *See, e.g.*, the Defense Supply Center-Philadelphia, *Reverse Auctioning* (July 31, 2001) [hereinafter DSCP *Reverse Auctioning*] (offering just two pages), *at* http://www.dscp.dla.mil/counsel/REVERSEA.htm; Defense Acquisitions University & Federal Acquisitions Institute, *Reverse Auction Community of Practice*, *at* http://www.dsmc.dsm.mil/CONTRACTING/FAIDAU/racop/ (last visited July 24, 2002) (a site that has been "under development" for more than a year and offers just four documents, all more than eighteen months old); *ABM Online*, *supra* note 52 (providing three pages of information).

IV. Difficulties and Challenges

Although the DOD may share the credit for creating the Internet,[114] it has long since been left in the cyber-dust by the business community, which—lacking guaranteed operating funds—has been forced to seek out more innovative (and more efficient) operating methods.[115] The entrenched bureaucratic mentality and its penchant for doing things "the way we have always done them" have hampered DOD's use of reverse auctions.[116] "The demands of the e-marketplace will challenge our fundamental notions of what it means to be in the public sector, from the highest

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113. *See, e.g.*, ACC *Reverse Auction Tacklebox*, *supra* note 21 (providing a fair amount of information, although most of it has not been updated in some time); AFMC *Reverse Auctioning*, *supra* note 95 (offering links to Air Force-wide guidance, Professor Wyld's report, enablers, news articles, sample specifications and briefings); Naval Inventory Control Point-Philadelphia, *auctions.navy.mil*, *at* http://www.auctions.navy.mil (last visited July 18, 2002) (including a reverse auction overview and links to news articles and the two GAO decisions); U.S. Dep't of Treasury, *Get Educated on Reverse Auctions*, *at* http://www.treasury.gov/procurement/training/ (last visited July 18, 2002) [hereinafter Treasury, *Get Educated*] (providing a primer, guidelines for determining when reverse auctions are appropriate, "Ten Commandments" for reverse auctions, and a side-by-side comparison of enablers in fifty areas).

The best resource *was* GSA's now-defunct Buyers.Gov Web page, which had a guide to best practices for reverse auctions, links to news articles, frequently asked questions, PowerPoint presentations, a demonstration of how auctions work, and more. When the Web page went down, all that valuable information apparently disappeared into the cyber-netherworld; it does not appear to be available through any link or search from the GSA home page. Whether it will return under the new contracted-out program remains to be seen. *See* E-mail from Ben A. Reed, E-Business Program Manager, Center for Business Innovations, Federal Technology Service, General Services Administration, to the author (Aug. 27, 2002) (leaving unsettled the question of whether his information will reappear on the Web) (on file with author).

114. *See* Public Broadcasting System, *Life on the Internet: Net Timeline*, *at* http://www.pbs.org/internet/timeline (last visited Mar. 18, 2002) (crediting the DOD for conceiving the Internet in the early 1960s).

115. *See, e.g.*, WYLD, *supra* note 14, at 8 (quoting one former government official as saying that "[i]t's clear to everybody that the public sector is behind the private sector when it comes to the use of information technology"); Meinert Interview, *supra* note 40 (observing that the digital transformation in the business community compared to that of the DOD is "mind-boggling" and that for the first year or two after the FAR rewrite, no one was willing to undertake a reverse auction).

116. *See* WYLD, *supra* note 14, at 43-45 (arguing that public government must undergo a significant "cultural change" before it can truly take advantage of electronic commerce); Meinert Interview, *supra* note 40 (stating that reverse auctions are such a different process that many people still do not feel comfortable using them).

elected and appointed officials to the front-line employees in all agencies at all levels of government."[117]

As a result, despite the high-profile reverse auction success stories, reverse auctions still represent a minuscule portion of the federal government's vast array of procurement activities.[118] The reasons are myriad and range from the tangible and logistical—technology failures and cost—to the theoretical and philosophical—resistance to change and concerns about how the government avoids being penny-wise but pound-foolish.

A. Industry's Distrust of, Unfamiliarity with, and Plain Dislike for the Process

While many government users are reverse auction disciples, the method has drawn significant criticism from the private sector. For example, one prominent procurement law report decried the Navy's first reverse auction as having "used an elephant gun to shoot a flea."[119] Before the first DFAS auction, "one well-known computer technology vendor refused to participate, saying it did not believe in reverse auctioning and had reservations about whether all the bidders truly would remain anonymous. The

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117. WYLD, *supra* note 14, at 44; *see also* U.S. GEN. ACCOUNTING OFFICE REPORT, DEFENSE ACQUISITIONS: DOD FACES CHALLENGES IN IMPLEMENTING BEST PRACTICES (Feb. 27, 2002) [hereinafter GAO, DEFENSE ACQUISITIONS] (Statement for the Record of Jack L. Brock, Jr., Managing Director, Acquisition and Sourcing Management, and Randolph C. Hite, Director, Information Technology Architecture and Systems) ("Incentives driving traditional ways of doing business, for example, must be changed, and cultural resistance to new approaches must be overcome."). After September 11, Professor Wyld wrote an article urging the procurement community to use reverse auctions as an acquisition streamlining tool that can "make government work better and produce the efficiencies necessary to fund a war on terrorism." David C. Wyld, *After September 11th: Reverse Auctions in Government Procurement*, CONT. MGMT., Feb. 1, 2002, at 54.

118. *See, e.g.*, Dan Davidson, *Cost-Saving Auctions Fail to Catch On*, FED. TIMES ONLINE, Nov. 13, 2000 (quoting Ralph DeStefano, GSA procurement analyst and FAR council staffer, as saying that, "overall . . . the use of reverse auctions in government is rare"), *at* http://www.federaltimes.com/infotech/111300infotech1.html; GSA GUIDE, *supra* note 12, at 23 (reporting that "buyers and suppliers are using reverse auctions on only an occasional basis"); Telephone Interview with Alan Thomas, National Account Executive, FreeMarkets, Inc., Pittsburgh (Feb. 4, 2002) [hereinafter Thomas Interview] (offering his opinion that government reverse auctions have not been as pervasive or widespread as anticipated).

119. *Auctions: Some Thoughts*, NASH & CIBINIC REP., July 2000, at 98, 99 [hereinafter NASH & CIBINIC] (charging that using "fancy electronic tools" was inappropriate in this case because there were so few bidders).

company submitted a proposal to DFAS, urging the agency not to conduct the auction."[120] After the auction, one participant called it the "worst procurement scenario ever invented."[121]

Some critics argue that reverse auctions create the risk of collusion.[122] Collusion, according to one researcher, is one of the two greatest weaknesses of a reverse auction.[123] Reverse auctions are "especially vulnerable to such price manipulation because in most cases there are, by definition, few buyers and sellers engaged in a given auction."[124]

Yet, another criticism leveled at reverse auctions is that it pits contractors against each other in virtual "hand-to-hand combat [that] unravels all the . . . work spent building a relationship-based environment" with suppliers.[125] Collusion might seem unlikely in such an open and fiercely com-

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120. Shane Harris, *Bidding Wars*, GOV'T EXECUTIVE, May 1, 2001, at 41, LEXIS, News Group File.

121. Smith Presentation, *supra* note 22, slide 14.

122. *See* Bob Little, *Auctions Can Eventually Reverse the Benefits of Competition*, GOV'T COMPUTER NEWS, Sept. 1, 2000, at 34, LEXIS, News Group File (in which the contract-law teacher and former GAO attorney argues that removing the secrecy of sealed bidding also removed a "bar to collusion"); Merson, *supra* note 16, at 12 (reporting the concern that dominant suppliers will "form alliances for the purpose of collusive bidding").

123. WYLD, *supra* note 14, at 15-16. Wyld defines collusion as "two or more bidders work(ing) in tandem to manipulate the price of an auction." *Id.* The other half of this pair is the "winner's curse." *See infra* notes 133-46 and accompanying text.

124. *Id.* at 16; *see also* Merson, *supra* note 16 (contending that "reverse auctions provide unprecedented opportunity, for those who would choose to do so, to attempt to control the bidding process").

125. *Air Force "Aims High"*, *supra* note 61, at 7; *see also* Letter from the Information Technology Industry Council, to the General Services Administration (Jan. 2, 2001) [hereinafter ITIC Letter] (claiming that reverse auctions could cause "an adverse shift in buyer/seller relationships" in which "suppliers could feel exploited by the process and less trusting of the buyers"), *available at* http://www.itic.org/policy/gsa_010102.pdf; OFFICE OF THE ASSISTANT DEPUTY SEC'Y OF THE AIR FORCE FOR ACQUISITIONS (CONTRACTING), REVERSE AUCTION RESEARCH PAPER 4 (2001) (reporting that private companies also found reverse auctions carried a "risk of damaging supplier relationships"), *available at* http://www.safaq.hq.af.mil/contracting/reverseauction/.

It seems to be too early in the reverse auction experience to gauge just how auctions will impact continuing supplier relationships. It is a legitimate concern, however, that procurement officials should monitor closely. In the DOD where contingencies are often a way of life, units must have suppliers on whom they can depend to meet unplanned requirements. The vendor who slashed his prices to rock-bottom may not be willing or able to satisfy the government buyer with unexpected and immediate deployment needs. *See* Snyder Interview, *supra* note 21 (reporting Air Force concerns that the lowest-price focus was not conducive to gaining long-term commitments from suppliers that would help meet contingency requirements).

petitive environment, but one detractor disagrees: "The bidders would quickly decide that (a) a bidding frenzy is stupid, (b) 'make love not war' works for them, and (c) if we have to conspire, it's better than losing money."[126]

On the other hand, vendors' auction behavior can actually highlight collusion by exhibiting bidding patterns that seem to send signals or by a lack of bids indicating a vendor has conceded a contract.[127] The "transparency" of online markets may in fact prevent graft, fraud, and corruption.[128]

B. Fear That Bidding Will Drive Prices So Low That They Eradicate Any Profit

Much of the criticism from suppliers and contractors is rooted in their bottom line.[129] One procurement consultant said contractors "fear that reverse auctions will push the prices so low that there is no margin left. . . . What will be left to invest in research, especially in the technology industry?"[130] Another industry analyst argues that the perceived focus on price may "alienate quality vendors who already believe their profit margins from sales to the federal government are too thin."[131] Government officials admit that eating into the industrial base of certain sectors is a legitimate worry.[132]

Behind these concerns looms the threat of the "winner's curse," which afflicts a bidder who gets so caught up in the auction frenzy that he bids far more than an item is worth, or, in a reverse auction, far less than he needs to make a profit or perhaps just break even.[133] Wyld cites the "winner's curse" (also called "buying in") as one of two primary problems confronting online auctions.[134] He says, "[T]he same supply and demand forces that shape markets in the physical realm, and the irrationality that

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126. Little, *supra* note 122.

127. Thomas Interview, *supra* note 118.

128. *See* WYLD, *supra* note 14, at 46 ("[T]he transparency of the cybermarketplace may . . . actually produce more legitimacy in pricing in the public sector.").

129. *See* Merson, *supra* note 16, at 5 (asserting that many government suppliers "already believe that their profit margins are too small"); ITIC Letter, *supra* note 125 (claiming that buyers' savings "may come from the reasonable profits of the suppliers," who then could be driven from the government marketplace).

130. Davidson, *supra* note 118 (quoting Washington, D.C. consultant Ella Schiralli).

131. Kevin Plexico, *Illusionary Automation*, FED. COMPUTER WK., June 5, 2000, http://www.fcw/com/fcw/articles/2000/0606/tec-plexico-06-0600.asp.

sometimes accompanies them, will be present in the e-marketplace as well—making the winner's curse a very real issue."[135]

While such a deal harms the contractor, it does the government no good either if the contract fails to motivate the contractor to perform up to standards. "The benefits of using online auctions as a procurement technique will be lost if the savings in time and cost are consumed through postaward contract claims, contract terminations due to poor performance, or the lack of competition for future contracts."[136] After the first DFAS auction, one participant warned, "When margins are squeezed, corners will be cut."[137] Some fear that reverse auctions could lead to mediocre results.[138]

How does the acquisitions community solve this problem? The ABA wants the FAR to delineate what constitutes a "fair and reasonable price" in a reverse auction.[139] Professor Wyld proposes a more novel solution: a "Vickery auction," in which the winning bidder pays the *second*-lowest price.[140] Thus, if Vendor *A* bids ten dollars per case of toilet paper, then

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132. *See, e.g.*, Smith Presentation, *supra* note 22, slide 15 (listing the threat to the health of an industry where profit margins are already lean as one of the "cons" of reverse auctions); Scott Memo, *supra* note 110, attachment, at 1 (reporting that corporate users also had to monitor the well-being of their supplier base); Ellen Messmer, *Defense Dept.'s Online Auctions Spark Controversy*, NETWORK WORLD, Aug. 7, 2000, at 1, LEXIS, News Group File (quoting Ken Oscar, acting OMB administrator, as saying that one concern is whether profits are being driven so low that "suppliers can't invest for the future"); Meinert Interview, *supra* note 40 (acknowledging that those who conduct reverse auctions have to ensure they keep the industrial base strong). For example, the Army wouldn't do a reverse auction for lithium batteries because "we only have two suppliers and we don't want them to kill each other." *Id.*

133. WYLD, *supra* note 14, at 18.

134. *Id.* at 15-16. The other is the threat of collusion. *See supra* notes 122-28 and accompanying text. *See also* FAR, *supra* note 24, at 3.501-1 (defining "buying in" as submitting offers below anticipated costs in expectation of making up the loss through contract changes or receiving follow-on contracts at inflated prices).

135. WYLD, *supra* note 14, at 16.

136. Burke, *supra* note 78, at 6.

137. Smith Presentation, *supra* note 22, slide 20.

138. *See, e.g.*, Little, *supra* note 76, at 37 (contending that reverse auctions "result in shoddy work"); ARMY SOURCE SELECTION GUIDE, *supra* note 109, at 76 ("When using reverse auctions in a best value acquisition, ensure the auction process does not drive prices down to the point that the resultant contract does not provide enough incentive for the contractor to provide quality supplies and services."); Smith Presentation, *supra* note 22, slide 33 (stating that one concern with reverse auctions is that "buying in" will leave the winning bidder with "no profit (and) no incentive to perform adequately").

139. ABA Letter, *supra* note 77.

Vendor *B* bids eight dollars per case just before the bell, Vendor *B* wins the right to sell the government his toilet paper—but he will do so at ten dollars per case. The Vickery auction allows reverse auction participants

> to bid in the full knowledge that someone would have to undercut their own bid in order to secure the buyer's business for the specific good or service. . . . The Vickery auction takes away some of the "frenzy" from the bidding, allowing prices to be set that are closer to the "true" market value of the item. This is because it allows bidders to be aggressive, while having the knowledge that their competitor(s) will determine the clearing price. . . . With governmental auctions, this may be even more important. This is because the use of the Vickery auction format could help to alleviate most concerns over the propriety of auctions. . . . The winner's curse is based on what is known as the "greater fool theory." In simple terms, this means that there may always be someone out there foolish enough to bid more than you . . . ![141]

A Vickery auction would thus protect bidders from themselves or other competitors, especially small businesses who could participate "with lessened fears that they would be undercut by larger firms."[142] The tradeoff, of course, is that the government pays more for whatever it is buying.[143]

Besides the lost savings, using a Vickery auction to avoid the winner's curse begs the question of whether the government should even be looking for a solution in the first place. If a bidder so lacks self-control that he cannot stop himself from cutting his own throat online, should Uncle Sam really be so paternalistic as to prevent him from doing so?[144]

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140. WYLD, *supra* note 14, at 18 (proposing the use of this Nobel Prize-winning technique developed by economist William Vickery).

141. *Id.* (citations omitted).

142. *Id. Cf.* Harris, *supra* note 120 (claiming that some sellers participate in reverse auctions with their goal not to win but to drive the price so low that it forces their competitors into money-losing contracts).

143. WYLD, *supra* note 14, at 18 (acknowledging that "the government would also not be maximizing its savings from the use of supplier auctions").

144. *See* Meinert Interview, *supra* note 40 ("Industry says we're forcing them to give us a price where they lose money. How? Nobody's holding a gun to their head.").

Even more compelling is the lack of even anecdotal evidence that underbidding is really a problem. Neither published articles nor reports from users in the field seem to document any resulting shoddy performance.[145] One government official has heard industry leaders warn of the danger of underbidding leading to substandard results, but every time he has challenged them to give him proof, "no one's been able to back it up."[146]

Reverse auctions are in fact cutting into profit margins, but perhaps many were not all that slim to begin with. Acquisition staffers are finding that just the possibility of reverse auctions appears to be driving prices down.[147] For example, the Navy had traditionally paid about seventy-five cents apiece for plastic bags used in nuclear repair. The lowest offer—before a planned reverse auction—came in at nineteen cents. The Navy bought the bags without an auction because it could not imagine getting a cheaper price.[148]

Additionally, although the Navy had to reopen the process (in traditional format) and ask for final price revisions after one of its failed auctions for moving services,[149] it still ended up saving sixty-seven percent, thanks to the auction bid-downs. [150] That drastic reduction led contracting officials to believe that perhaps they had been paying too much in past years.[151]

The mindset among many contracting officers, however, can pose a problem. "They've been trained only to drive the price down, but the FAR

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145. The Navy's Commander Ellis said he has checked with contracting officers but never heard any negative reports about auction winners' performance. Ellis Interview, *supra* note 23. At CECOM, Mr. Meinert agrees: "I have not seen one person fail to deliver" after a reverse auction. Meinert Interview, *supra* note 40. Mr. Thomas said FreeMarkets has had some customers for five years, "and I have not ever witnessed that type of irrational behavior." Thomas Interview, *supra* note 118.

146. Meinert Interview, *supra* note 40.

147. The Army has been seeing non-auction, sealed-bid prices twenty-five to thirty percent lower. *Id.* Mr. Meinert believes that before reverse auctions, contractors simply took the historical prices and bid five to ten percent lower. Now, the ever-present possibility of reverse auctions has forced suppliers to look harder for ways to cut costs. *Id.* Similarly, at the Navy, "it seems like because we've told them we're going to do reverse auctions, the proposals come in a lot lower." Ellis Interview, *supra* note 23.

148. Ellis Interview, *supra* note 23.

149. Royal Hawaiian Movers, Inc., Comp. Gen. B-288653, Oct. 31, 2001, 2001 CPD ¶ 182; *see infra* notes 168-70.

150. Ellis Interview, *supra* note 23.

151. *Id.*

is pretty clear on the fiduciary duty of a contracting officer—he has a duty to do something when the price is too low."[152] In other words, practitioners must never forget that a fair price has "three critical components . . . fair to the buyer; fair to the seller; and fair under market conditions."[153]

When contracting officials do not grasp that concept, the results can be wasted time and effort, as evidenced by the experience of one Army division in Alabama that did a reverse auction for contract close-out services. The specification was unclear about whether the contractor would perform the services on-site in Alabama (as the customer wanted).[154] The bidding started at $120 an hour before eventually a company in Texas chimed in at just seven dollars an hour—a drop of almost ninety-five percent. The CECOM warned the Alabama agency that something had to be wrong because the Texas company clearly could not do the job in Alabama for so low a price. Alabama personnel, however, refused to stop the auction. As it turned out, the Texas bidder thought that the customer would send it the documents—not that it would come to Alabama. The agency ended up canceling the procurement and starting over.[155]

C. Not Doing Your Homework Means a Failing Grade

Slipshod procurements like the Alabama one demonstrate why poor preparation, including drafting specifications, carries the greatest potential for "harm . . . to the integrity of the procurement process."[156] As with every procurement, but even more so with reverse auctions, it seems

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152. Meinert Interview, *supra* note 40; *see also* OFFICE OF THE DEPUTY ASSISTANT SEC'Y OF THE AIR FORCE FOR ACQUISITION (CONTRACTING), AF REVERSE AUCTIONING (RA) POLICY STRATEGY No. 2 (Feb. 2001) [hereinafter AF REVERSE AUCTIONING POLICY STRATEGY] ("Policy should emphasize the CO responsibility."), *available at* http://www.safaq.hq.af.mil/contracting/reverseauction/.

153. AF REVERSE AUCTIONING POLICY STRATEGY, *supra* note 152, No. 3; *see also* FAR, *supra* note 24, at 15.402(a) (requiring contracting officers to "[p]urchase supplies and services from responsible sources at fair and reasonable prices"); *Buyers.Gov*, *supra* note 94 (News & Links, Question & Answer No. 34) (stating that "use of the auction does not relieve procurement officials from using their judgment to reach a sound business decision").

154. Meinert Interview, *supra* note 40.

155. *Id.*

156. Royal Hawaiian Movers, Inc., Comp. Gen. B-288653, Oct. 31, 2001, 2001 CPD ¶ 182, at 5.

impossible to overemphasize the importance of meticulous groundwork.[157]

After surveying corporate users, the AF reported that "[t]heir key advice on when [the reverse auction] is an appropriate sourcing strategy can be summarized by saying that *advance preparation is critical.*"[158] Must-have preparation includes well-thought-out requirements, solid market research, a good acquisition plan, and thorough training for participants.[159] Prescreening bidders has also proven crucial—although the up-front effort (and sometimes money) to lay the needed groundwork could negate some of the time and cost savings.[160]

Both GAO decisions on reverse auction protests dealt with poorly written specifications. Both also involved the Navy's attempt to obtain contracts for moving services in the Pacific—one for a requirements contract for packing and crating services on Guam,[161] and the second for movement of containers on Oahu, Hawaii.[162]

In the first, *Pacific Island Movers*, the request for proposals stated that the reverse auction would last sixty minutes and that bids during the last five minutes would extend the auction for an additional fifteen minutes.[163] Only two bidders—Pacific Island Movers and Dewitt Transportation Services—participated, but the limited number of bidders did not translate to a limited number of bids. The auction began on 18 April and was still going—but not yet gone—on 19 April at 1400, when the Navy issued an

157. *See* Smith Presentation, *supra* note 22, slide 39 ("Upfront work (is) vital to success."); ACC *Reverse Auction Tacklebox*, *supra* note 21 ("Good up-front acquisition planning is the baseline for a successful Reverse Auction.").

158. Scott Memo, *supra* note 110, attachment 1, at 1.

159. Smith Presentation, *supra* note 22, slide 39; *see also* Treasury, *Get Educated*, *supra* note 113 (Ten Commandments) (recommending that buyers conduct mock auctions because "practice makes perfect").

160. Merson, *supra* note 16, at 3; *see also* Snyder Interview, *supra* note 21 (asserting that the reverse auction learning curve—for both the government and vendors—may in fact increase the overall time needed to complete a procurement); *infra* notes 213-14. *But see* Gary D. Stephens, A Case Study of the Army Reserve Auction 53 (June 2001) (unpublished thesis, Naval Post Graduate School) (predicting that as vendors gain experience and familiarity with reverse auctions, the advance training will take less time) (on file with author).

161. Pacific Island Movers, Comp. Gen. B-287643.2, July 19, 2001, 2001 CPD ¶ 126.

162. Royal Hawaiian Movers, Inc., Comp. Gen. B-288653, Oct. 31, 2001, 2001 CPD ¶ 182.

163. *Pacific Island Movers*, 2001 CPD ¶ 126, at 2.

amendment unequivocally ending the auction an hour later, no matter how many last-minute bids came in.[164]

When the auction finally ended, Pacific had submitted the lowest bid. Dewitt protested to the GAO, alleging, among other things, that the Navy stifled fair competition when it arbitrarily ended the auction.[165] Conceding a losing battle, the Navy chose not to defend the reverse auction, but instead told the GAO it would fix the problem by "reverting to a traditional negotiated competition and requesting final price revisions."[166]

The GAO then dismissed Dewitt's protest; the Navy began the process of obtaining the final prices; and Pacific protested the corrective action. The GAO denied Pacific's protest as well, finding the Navy's corrective measures to be reasonable,[167] but in its next reverse auction decision it cited this first case as exemplifying the pitfalls of "an inept reverse auction."[168]

The second GAO decision came just three months after the first. *Royal Hawaiian Movers* also concerned ambiguities in the request for proposals (RFP) regarding the conduct of the auction and how it would end.[169] The RFP stated the auction would allow a maximum of fifty extensions and would end no later than 1400 hours local time.[170] If the bidders used all fifty extensions, however, the auction would last until 1410 hours. Four offerors participated in the auction, and Pacific Express submitted the last offer before 1400. Royal Hawaiian Movers submitted the lowest overall bid at 1409:49. The Navy awarded the contract to Royal Hawaiian Movers, and Pacific Express filed an agency protest.[171]

The Navy, believing that the ambiguous solicitation made the auction "inherently unfair," again faced a mess it could not easily clean up. So once again it converted to a traditional negotiated procurement, reopened the competition, and requested final proposal revisions. Royal Hawaiian

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164. *Id.*

165. *Id.* DeWitt also complained about the malfunction of some auction software. *See infra* notes 178-80 and accompanying text.

166. *Pacific Island Movers*, 2001 CPD ¶ 126, at 2.

167. *Id.*

168. Royal Hawaiian Movers, Inc., Comp. Gen. B-288653, Oct. 31, 2001, 2001 CPD ¶ 182, at 5.

169. *Id*.

170. *Id*.

171. *Id*.

then protested to the GAO. Although the GAO upheld the Navy's actions, it said, "The circumstances of this case, in our view, highlight the importance of having unambiguous ground rules in reverse auctions."[172]

Because reverse auctions often compress the actual purchase period, watertight specifications are critical. As an example, the GSA points to a reverse auction for information technology in which the specification failed to address the warranty, after-sale service, or a minimum quality standard for vital computer components. Without meticulous specifications, the government could end up with a winning bidder incapable of meeting the agency's needs.[173]

D. "I'm Sorry, Dave, I'm Afraid I Can't Do That,"[174] or the Role of the Computer

Computers—and those who run them—make online reverse auctions possible. But the dependence on technology is fraught with potential minefields, ranging from systems that crash to the cost of conducting the auction to whether contracting officers are abdicating their responsibility to machines.

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172. *Id.*

173. GSA GUIDE, *supra* note 12, at 8 & n.3; *see also* AMS & FREEMARKETS, *supra* note 81, at 3 (recommending that buyers expand traditional specifications by adding detail for online auctions). Specifications also must permit "apples to apples" comparisons, especially in auctions for services. For example, if trying to acquire transportation services, it is not enough to tell the suppliers to get people from point A to point B—the specifications should delineate whether the services are to be by ground, air, etc. Thomas Interview, *supra* note 118. While all this is also true in traditional procurements, if the agency catches the discrepancy early enough in the standard process, it may be able to resolve the problem. But that luxury of time to fix flaws disappears in the middle of a sixty-minute auction. *See Royal Hawaiian Movers*, 2001 CPD ¶ 182, at 4 (observing that "under the time pressure of a reverse auction," firms may have no choice but to continue bidding even if they believe some impropriety has occurred).

174. HAL 9000, the artificially intelligent computer in *2001: A Space Odyssey* (Metro-Goldwyn-Mayer 1968).

1. Technology Failures

Computers are wonderful things—until they quit working. In reverse auctions, Internet or systems failures are potentially catastrophic.[175]

In the Navy's first reverse auction, it thought the auction had ended after thirty-eight minutes.[176] Then FreeMarkets, the auction provider, called and said that one of the bidders had lost connectivity in the middle of the auction. The contracting officer chose to reopen the bidding. The eventual losing bidder—the original winner—protested the award because it thought FreeMarkets had unilaterally chosen to reopen the auction. Once the protestor found out the contracting officer made the decision, it withdrew the protest.[177]

Besides sloppy specifications, *Pacific Island Movers* also involved the Navy's inability to deliver promised "real-time software" that would have allowed each bidder to see its standing in the auction.[178] Dewitt complained that, because it could not see its relative position in the auction, it could not actively compete with Pacific, as intended by the reverse auction procedures.[179] The GAO agreed, stating that "the undisputed software malfunctions . . . called into question the fairness of the competition."[180]

The Army has a help desk available during every auction and gives each vendor training on how to handle problems such as connectivity losses.[181] The solicitation for GSA's enabler services requires the enabler to provide the "ability to recover from a catastrophic outage (*i.e.*, ability to re-create the Reverse Auction from the point of failure)"[182] and a "pause"

175. *See* Mary Galbraith, *Internet Contract Auction Saves Money*, HILLTOP TIMES (Hill Air Force Base, Utah) (Jan. 25, 2001) (quoting a Hill contracting official as saying that "the process' weak point is the possibility of a lost Internet connection"), http://www.hill-toptimes.com/archive/20010125/Mainstory.html.

176. Ellis Interview, *supra* note 23.

177. *Id.*; *see also* ACC *Reverse Auction Tacklebox*, *supra* note 21 (Lessons Learned) (recommending that, in case of bidding or connectivity problems, contracting officers reopen the reverse auction to give bidders another chance to submit offers).

178. Pacific Island Movers, Comp. Gen. B-287643.2, July 19, 2001, 2001 CPD ¶ 126.

179. *Id.*

180. *Id.*; *see also* Snyder Interview, *supra* note 21 (reporting that the Air Force also cancelled one of its reverse auctions and requested final paper bids because of software problems).

181. Meinert Interview, *supra* note 40.

182. *FedBizOps.gov*, *supra* note 38 (Solicitation No. 7TS-01-0001, para. B.5.b).

capability to halt the auction if a bidder loses communications (or a similar method to handle system failures).[183]

2. The Cost of Doing Business

While a good auction provider can mitigate some of the danger of a system failure, the services do not necessarily come cheap: For "simple" auctions, the cost under the Navy's contract is one to two percent, with a $500 minimum and a $10,000 maximum. "Full-service" users will pay $20,000, $25,000 if the service provider also does market research.[184] The GSA's Buyers.Gov charged a fee of two to nine percent, depending on the size of the sale.[185]

Additionally, these companies are vulnerable to the same troubles that have beset the rest of the "dot.com" industry. For example, FedBid.Com conducted the SBA's auction for professional services in November 2000.[186] By December 2000, the company had shut down due to lack of funding.[187] One industry analyst anticipated that half of the seventy "e-government" companies will go offline in 2002.[188]

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183. *Id.* (Solicitation No. 7TS-01-0001, para. B.6.g). Auction provider FreeMarkets' services include setting up an operations center during the auction, where personnel monitor the bidding and troubleshoot any problems. Thomas Interview, *supra* note 118. If necessary, FreeMarkets will provide "surrogate bidding" for a vendor or make arrangements for a participant to bid over recorded telephone lines. Surrogate bidding involves the enabler entering the bids for the supplier, either over the telephone or online. *Id. See also* GSA GUIDE, *supra* note 12, at 11 (recommending use of a "phone bridge" for backup communications during the auction).

184. *ABM Online*, *supra* note 52. The Navy is paying eBreviate, Inc. $13.8 million over five years for the full-service option. Patience Wait, *Navy Awards eBreviate $13.8 Million Deal for Online Auctions*, WASH. TECH., Dec. 12, 2000, http://www.washingtontechnology.com/news/1_1/egov/15021-1.html.

185. Jackson, *supra* note 31. The Treasury Department's survey of five enablers concluded that the companies' pricing was extremely flexible and negotiable. Variables that impacted price included the number and value of auctions, the length of time over which they were to be conducted, and the service level and add-on options. Price structures included a percentage share of the savings, a per-event fee, or fees based on licensing agreements, such as the Army's. *See* Treasury, *Get Educated*, *supra* note 113 (Enablers' Capabilities).

186. PR Newswire, *FedBid.Com*, *supra* note 39.

187. Nick Wakeman, *E-gov Vender Portals Go Belly Up*, GOV'T COMPUTER NEWS, Feb. 5, 2001, at 11, LEXIS, ASAPII Publications—Federal Public Contracts. In April 2001, another e-commerce partnership acquired FedBid.Com, enabling it to resume providing its Web-based marketplace for business-to-government procurement. FedBid.Com, *About FedBid.Com*, *at* http://www.fedbid.com/aboutfedbid.jsp (last visited Mar. 21, 2002).

3. Whose Line Is It, Anyway?

Additionally, some question how much the reverse auction providers can actually do. Are reverse auctions an inherently government function, one so "intimately related to the public interest as to mandate performance by government employees?"[189] The OFPP has specifically categorized approving contract documents, awarding contracts, and administering contracts as inherently governmental functions.[190]

Attorneys for the DLA's Defense Supply Center-Philadelphia warn against allowing reverse auction enablers to do too much: "The agreements with them must be structured to avoid their performing inherently governmental functions . . . including approving contract documents and awarding and administering contracts."[191]

The DIBBS, the Defense Supply Center-Columbus e-commerce procurement system, has a built-in screening program. Once the auction closes (always at 1700 hours on the solicitation return date), an "automated awards program takes all the bids and applies a sophisticated price-reasonableness algorithm to evaluate the bids. If the offers pass various tests involving contractor reliability and price reasonableness," the system automatically sends an e-mail message to the winning contractor notifying it of award, followed by a second message with the contracts attached.[192] Close to half of the online procurements are completely automated, handled entirely by a computer without human intervention in a process that takes less than one minute from the auction close to the online contract delivery.

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188. Wakeman, *supra* note 187; *see also* Treasury, *Get Educated*, *supra* note 113 (Ten Commandments) (warning auction holders to choose a "solid performing enabler" that is more likely to survive the troubled digital economy).

189. Office of Federal Procurement Policy Letter 92-1, Policy Letter on Inherently Governmental Functions, 57 Fed. Reg. 45,101, para. 5 (1992) [hereinafter OFPP Letter 92-1].

190. *Id*.

191. DSCP *Reverse Auctioning*, *supra* note 112; *see also* GSA, *Buyers.Gov*, *supra* note 94 (News & Links, Information Technology Association (ITAA) Questions & Answers, No. 17) ("At no time will the enablers approve contract documents, award contracts or administer contracts.").

192. Pavilkey, *supra* note 42.

The DIBBS highlights questionable or non-routine bids that need oversight by human eyes.[193]

During DIBBS' first three months online, the DSCC used it to make 863 fully automated auction awards. The DSCC realized monetary savings in only slightly more than a third of those procurements, for a total of about $147,000, but officials also touted the reduced lead time and labor, which allowed DSCC personnel to focus on more complex acquisitions.[194]

The DIBBS is an in-house governmental system, not a contracted-out function, so arguably it follows the technical letter of the OFPP policy on inherently governmental functions. The question of whether it adheres to the spirit of the law is more troubling. The OFPP states that inherently governmental functions "include those activities that require either the exercise of discretion in applying Government authority or the making of value judgments in making decisions for the government."[195] No matter how "sophisticated" the "price-reasonableness algorithm," a computer still cannot exercise discretion or make a value judgment.

Even if one accepts that the OFPP inherently governmental policy does not apply to DSCC's automated contracting activities, it does not necessarily follow that a completely automated contract award is appropriate. The FAR is explicit about who has responsibility for awarding contracts—and it is not a machine. Only *contracting officers* have the authority to enter into contracts,[196] and the *contracting officers* "shall" award the contract. [197] "*No* contract shall be entered into unless the *contracting officer* ensures that all requirements of law, executive orders, regulations, and all other applicable procedures . . . have been met."[198]

Admittedly, requiring a live body to sit at the computer and simply rubber-stamp the electronically made decision may seem a triumph of form over substance. But slavish devotion to the gods of technology and automation can end up sacrificing the integrity of the process. As the Air Force warns, "Regardless of the acquisition method, contracting officer responsibility still prevails."[199] When contracting officers cede that responsibility and control, it damages the credibility of and public faith in

193. *Id.*
194. *Id.*
195. OFPP Policy Letter 92-1, *supra* note 189, para. 5.
196. FAR, *supra* note 24, at 1.602-1(a).
197. *Id*. 14.408-1(a) (for sealed bids), 15.303(c) (negotiated procurements).
198. *Id*. 1.602-1(b) (emphasis added).

the government procurement system. For example, one government contractor in Columbus has reservations about the DSCC system's ability to distinguish higher priced but better value offers.[200] He is right—a computer *cannot* be that discerning.[201]

E. When the Best Price Is Not the Best Deal

That clash between price and value is perhaps the most intense—and certainly one of the most valid—concerns regarding online auctions. One acquisitions staffer admits, "Collectively, in the DOD, we are too focused on just price in reverse auctions."[202]

Some government vendors also fear that the price will trump consideration of best value.[203] One critic charges, "A reverse auction by definition must result in an award based purely on price. It does not permit differing technical evaluations of competing products."[204] Another indus-

199. Boykin Presentation, *supra* note 22, slide 12; *see also* GSA, *Buyers.Gov*, *supra* note 94 (News & Links, ITAA Questions & Answers, No. 17) ("The government has not given up control and does not intend to give up control of its procurement process by using auction techniques . . . . There will always be contract specialists and contracting officers involved in the process, ensuring that the integrity of the process is intact.").

200. Pavilkey, *supra* note 42 (quoting Eric Tubbs, government contracts manager at Columbus Equipment Co.). Tubbs gives the example of a contractor who offers two filters, one cheaper but less efficient, while the more expensive filter is also more effective. "That isn't necessarily going to show upon the bid," Tubbs says. "I question whether an automated system can adequately evaluate the technical issues involved." *Id.*

201. *See also infra* notes 218-22 and accompanying text (discussing automated best value selection).

202. Meinert Interview, *supra* note 40. The Air Force also found that "in the long term, with most of the stuff we buy, price and only price is not in the best interest of what we do." Snyder Interview, *supra* note 21.

203. *See, e.g.*, Burke, *supra* note 78, at 2 (noting the apprehension that auctions "place undue emphasis on price in a procurement in relation to its importance in the evaluation criteria"); Davidson, *supra* note 118 (quoting one industry leader as saying that "there is a profound concern that they will do away with value and put the emphasis squarely on price"); Harris, *supra* note 120 (warning of industry's worries "that the government will end up with a fleet of Yugos").

204. Ryan, *supra* note 76, at 22. Ryan also calls reverse auctions "antithetical to the principle . . . of using best value and past performance." *Id.*

try observer claims, "It is impossible to do a proper best value award on a reverse auction."[205]

Proponents disagree. The GSA asserts: "Reverse Auctions do not preclude the use of best value criteria for consideration in the contract award. You must not consider only the price, but also the technical management and past performance of the bidder."[206] The GAO also said:

> When the government first began using reverse auctions for online procurement, the lowest price[,] technically acceptable bid award was more common, because they are simpler and more applicable to commodities. As we have progressed in our thinking about the use of reverse auctions for online procurement, we now see that reverse auctions are an effective tool for promoting best value selection during the procurement process.[207]

During its September 2000 studies, SAF/AQC found that most corporate users did *not* award solely to the lowest bidder but instead made reverse auction awards on a best value basis.[208] FreeMarkets has done about 17,000 reverse auctions, mostly for the private sector, and the low bidder lost out in about half of the auctions.[209]

Accomplishing this "best value" consideration probably will require at least two steps. Contracting officers may first have to get information such as technical proposals from bidders to evaluate the non-price factors. The reverse auction then becomes simply a "price negotiation tool."[210] The Air Force's guidance envisions a similar phased approach: Phase I involves determining supplier capability to meet the agency's needs; the second phase is the reverse auction to establish the best price, followed by

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205. Terry Miller, *Miller on Procurement; Government Activity*, FED. COMPUTER MARKET REP., Oct. 23, 2000, at 6, LEXIS, News Group File. According to the magazine, Miller spent thirty-five years in federal procurement.

206. GSA GUIDE, *supra* note 12, at 3.

207. *Id.* at 1. *Cf.* Stephens, *supra* note 160 (manuscript at 61) (maintaining that a lowest-price, technically-acceptable acquisition is the best choice for reverse auctions because it minimizes the selection factors other than price, which in turn simplifies the procurement as well as keeping it objective).

208. Scott Memo, *supra* note 110, attachment, at 1.

209. Thomas Interview, *supra* note 118; *see also* Amy Santenello, *Government Uses of Internet Auctions*, META GROUP DELTA, July 24, 2001, at 1, LEXIS, News Group Files (reporting a claim that best value reverse auctions lead to award to the lowest bidder in only about five percent of the auctions).

the last phase of determining best value and bidder responsibility in order to make the final award.[211]

In January 2001, the Ogden Air Logistics Center (ALC) at Hill Air Force Base, Utah, used a reverse auction for a best value acquisition for airplane parts.[212] Contracting officers first screened potential bidders based on past performance. Vendors had to document their capability to provide a quality product. Those who did not submit the required information were denied the user name and passwords required to participate in the auction.[213] The advance preparation added weeks to the process, although AFMC officials touted the auction as a "way to streamline the contracting process and make it faster."[214]

The Army's CECOM developed an award-winning program to help buyers evaluate bids on subjective quality factors and variables such as warranties and quality guarantees.[215] The Army now is able to give added

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210. GSA GUIDE, *supra* note 12, at 1; *see also* Meinert Interview, *supra* note 40 (noting that the Army has also used this approach with good results); AFMC *Reverse Auctioning*, *supra* note 95 (providing the Navy's sample instructions, which advise offerors that initial proposals would be used to establish the competitive range, and then the auction would be used as "discussions" to allow offerors to revise their price proposals); ACC *Reverse Auction Tacklebox*, *supra* note 21 (reporting that this two-step process has seemed to work well).

211. AF REVERSE AUCTIONING POLICY STRATEGY, *supra* note 153, No. 13. The Air Force labels using reverse auctions in the best value environment as "can-do"—but only with such a three-phased approach. *Id.*; *see also* ITIC Letter, *supra* note 125, at 2 (recommending that the government evaluate factors other than price before the auction, conduct the auction to determine price, then perform an "integrated evaluation of both price and factors other than price to quantify the 'Best Value' "); AMS & FREEMARKETS, *supra* note 81, at 3-4 (suggesting qualifying bidders before the auction and evaluating bids and weighing "all relevant factors—not just the price"—after the auction to make a best value award); Richard Rector, *As E-Buying Hits Fed World, Time to Draw Lines*, WASH. TECH., May 22, 2000 (asserting that this three-step method would "provide the government with the best of both worlds"—the lowest price and the best value), http://www.washingtontechnology.com.

212. Galbraith, *supra* note 175.

213. *Id.* Hill also ran a mock auction with practice bids, documenting problems and gathering recommendations from vendors. Together, the contracting officers and the potential vendors made fifteen recommendations to improve the process—fourteen of which were accepted by the Army, which provided the system. Most were aimed at simplifying the process or making the site more user-friendly for the bidders. *Id.*

214. *Id.* After eighty minutes of bidding, the Air Force had realized savings of about nineteen percent. In this auction, not only did the competing vendors have real-time views of the bidding, but staffers at other ALCs and the Secretary of the Air Force acquisitions office watched the online action from their own computers. *Id.*

weight (e.g., an extra ten points to the bidder's total score) for options such as upgraded power, faster performance, and more responsive service.[216] The weighting occurs simultaneously with the bidding, and bidders see their score or range online. As with traditional procurements, contracting officers still have to do a source-selection plan and provide a rationale for how the award decision will be made, with the evaluation factors fully explained up front to the bidders.[217]

Enablers or auction service providers offer a variety of methods to conduct an auction that does not focus solely on price. FreeMarkets, for example, can build a decision matrix into the software that allows the customer to give various weights to each of three different payment options, or it can even give the bidders an online ranking.[218] The Buyers.Gov enablers offered some tools that automated best value evaluations, as well as separating price from subjective and technical assessments when needed.[219] The GSA stressed, however, that "the entire process will be monitored by Government personnel. All award decisions will be made by Government personnel."[220]

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215. Shane Harris, *Acquisition Awards—Army, BestBuy.Gov*, GOV'T EXECUTIVE, Aug. 1, 2001, http://www.govexec.com/top200/01top/army.htm. Experience led the Army to realize that a best value determination should be an option in reverse auctions. "Gateway would call in the middle of an auction and offer a flat screen," instead of the traditional screen, and CECOM had no way to take advantage of that feature. Meinert Interview, *supra* note 40.

216. Meinert Interview, *supra* note 40. For example, the Army was able to factor in the speed of service for an Army customer in Germany that wanted on-site service within three days. *Id.*

217. *Id.* Another suggestion to avoid overemphasizing price is to conduct quantity-based auctions. In such an auction, the buyer sets the amount it wants to spend—for example, $1 million for computers—and the vendors base their bids on how many computers they can provide for that amount. Treasury, *Get Educated*, *supra* note 113 (Ten Commandments).

218. Thomas Interview, *supra* note 118.

219. GSA, *Buyers.Gov*, *supra* note 94 (News & Links, ITAA Questions & Answers, No. 2). Optional "value added" features discussed in the outstanding enabler solicitation include the "ability to accommodate variables other than just a price comparison (for example, delivery time, warranty, stock availability, etc.)," software that allows the government to define best value evaluation criteria, and "real-time evaluation of bids based on best value designated variables." *FedBizOps.gov*, *supra* note 38 (Solicitation No. 7TS-01-0001, para. B.7).

220. GSA, *Buyers.Gov*, *supra* note 94 (News & Links, ITAA Questions & Answers, No. 2).

The GSA is right to be concerned. Using an automated best value evaluation capability suffers from the same weakness as the DIBBS contract award system. It abdicates the selection decision to a machine, while the FAR places the responsibility for choosing among offerors on the source selection authority (SSA).[221]

> Although the SSA may rely upon analyses and the like in making its determination, GAO may understandably reject an award in which the SSA relies too heavily on a predetermined, routinized "best value" formula to reach an award decision. Indeed, GAO has ruled on a number of occasions that a mathematical tradeoff formula may be used as one source selection tool, but it has insisted that qualitative assessment is still required.[222]

F. Not a Perfect Match for Everything

Part of the reverse auction growing pains have been users' difficulty and inexperience in determining which types of procurement are appropriate for reverse auctions. No one says that reverse auctions are a one-size-fits-all solution.[223]

A significant number of reverse auctions have been for information technology (IT) products. In fact, the Army has promoted IT products as "good candidates" for reverse auctions.[224] Commercial, "off-the-shelf"

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221. *See* Palmer et al., *supra* note 69, at 8 (concluding that FAR 15.308 "clearly requires that the source selection decision be made by the source selection authority and not by a software package").

222. *Id.* at 8-9.

223. *See, e.g.*, Smith Presentation, *supra* note 22, slides 38-39 (stating that a reverse auction should be used only where "it makes sense"); Stephens, *supra* note 160 (manuscript at 63) ("Reverse auctions are not 'silver bullets' designed for use in all situations."); Harris, *supra* note 120 ("The prevailing wisdom among buyers, sellers and providers of auction services is that the technique is one more tool in the procurement toolbox.").

224. Chris Vuxton, Analyst, Office of the Deputy Assistant Secretary of the Army (Procurement), "Reverse Auctions," Presentation at the U.S. Army Corps of Engineers Principal Assistant for Contracting Roundtable 2001, slide 8 (June 14, 2001) [hereinafter Vuxton Presentation] (on file with author). *See also* Meinert Interview, *supra* note 40 (stating that IT requirements are by far the easiest to fulfill through reverse auctions because they can be so clearly defined); AFPC Press Release, *supra* note 23 (reporting that the Air Force Personnel Center called its purchase of 833 computers "an ideal requirement for online auctioning").

type items or commodities (e.g., toilet paper in bulk) are natural subjects for reverse auctions as well.[225]

Some detractors, however, have taken that practice a step further, saying DOD should not use reverse auctions for *anything* other than buying fungible commodities.[226] One skeptic argues that the Navy's groundbreaking purchase of ejection seats is exactly what the military should *not* do, because it puts pilot safety at the mercy of a component made by the lowest bidder.[227]

Air Force procurement officials are wary, as well, about using reverse auctions in the sustainment arena versus the operational side of the house. They cite the complexity of the acquisitions (fewer commercial products), the lack of competition (almost two-thirds of the sustainment spare con-

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225. *See, e.g.*, Stephens, *supra* note 160 (manuscript at 65) (asserting that reverse auctions are most appropriate for these types of items); ACC *Reverse Auction Tacklebox*, *supra* note 21 ("Commercial items with build to print specifications are the most lucrative targets."). The DOD acquisition guidelines say reverse auctions are useful techniques for determining a fair and reasonable price, as well as bringing competition to commercial item procurements. OSD HANDBOOK, *supra* note 107, at 13. The Marine Corps Regional Contracting Office Southwest had plans to buy at least one-fourth of its commodity-type items through reverse auctions. *ABM Online*, *supra* note 53. Almost all DSCC's reverse auction buys were for mechanical parts—transistors, brake drums and shields, semiconductors, tires and wheels, etc. *DIBBS Auction Records*, *supra* note 43.

226. *See, e.g.*, NASH & CIBINIC, *supra* note 119, at 99 (expressing reservations about using reverse auctions for buying complex items); Davidson, *supra* note 118 (quoting one industry representative as saying reverse auctions are "appropriate only for a limited number of interchangeable, nontechnological products"); *see also* Treasury, *Get Educated*, *supra* note 113 ("What's Appropriate, What's Not) (warning that reverse auctions may not be appropriate when dealing with complex requirements and purchases that include significant servicing needs).

An Army researcher who studied CECOM's first forty-three auctions found that eight were for "military unique items," built to agency-written specifications. Twenty-five were for IT-related products, six were for appliances such as dishwashers, and four were for "other" items (for example, the goats). Of the eight military-unique items, *none* was for a new requirement—all were for previously developed and procured items. The researcher concluded that the DOD should not employ reverse auctions to fill new requirements for items built to military-developed specifications. Stephens, *supra* note 160 (manuscript at 49-51).

227. Ryan, *supra* note 76; *cf.* Snyder Interview, *supra* note 21 (noting that AFMC's auctions for airplane components were for "non-safety-of-flight parts"). *But see* Ellis Interview, *supra* note 23 (stressing that the reverse auction contracts required the "same 100 percent quality assurance tests that were required in the traditional procurements").

tracts in fiscal year 1999 were sole-source awards), and the possibility of compromising flight safety as cautionary issues.[228]

Moving beyond *any* type of product into the realm of auctioning for services makes even some government officials a little leery. Deidre A. Lee, DOD director of procurement and former OFPP administrator, has said, "I think reverse auctions work well for commodities or products. I'm a little less sure about how we expect to buy best-value services."[229] Using reverse auctions for services—especially those with complex requirements or without well-defined specifications—can increase the risk of unsatisfactory results.[230]

One researcher, however, wants to see reverse auctions extended to service contracts:

> Recently, the dollars spent by the . . . DOD on services surpassed the amount spent on goods. The future use of the reverse auction in acquisition for services is a logical path. . . . The question is not whether to use or not use a reverse auction for the acquisition of services, but when.[231]

Reverse auctions may work for procuring services "as long as they are non-complex and well-defined."[232] The ability to articulate and delineate

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228. Major Randy Looke, Air Force Materiel Command Contracting Office, Presentation, "Reverse Auctioning in the Sustainment World," slides 2-3, 6 (Aug. 2000), *available at* https://www.afmc-mil.wpafb.af.mil/HQ-AFMC/PK/pko/revauctn.ramain.htm. A recent GAO report, however, found the Navy, Marine Corps and DLA were experiencing worrisome price increases for spare parts—an annual average of 12% for the Navy, 14% for the Marine Corps, and as much as 1000% or more a year for a few parts bought by DLA. GAO, DEFENSE ACQUISITIONS, *supra* note 117, at 21-22. In the right circumstances, a reverse auction could provide a viable option to help curb such costs.

229. Dawn S. Onley, *Procurement Is a People Business; Interview with Deidre A. Lee of DOD*, GOV'T COMPUTER NEWS, July 23, 2001, at 17, LEXIS, ASAPII Publications—Federal Public Contracts; *see also* Ryan, *supra* note 76 (urging the FAR councils to "warn agencies away from purchasing . . . services" through reverse auctions).

230. GSA, *Buyers.Gov*, *supra* note 94 (News & Links, Question & Answer No. 31). For example, one of the flaws in the Navy's first failed auction for moving services was the extensive requirement that included 170 line items. Each line item required a minimum price, and any one or all could be revised, a process that significantly complicated the auction. Ellis Interview, *supra* note 23.

231. Stephens, *supra* note 160 (manuscript at 66). The 2002 National Defense Act also requires the DOD to "establish and implement a management structure for procurement of services" comparable to that for procuring products. GAO, DEFENSE ACQUISITIONS, *supra* note 117, at 6.

the needed services and their required features is critical.[233] Potential candidates include training, security, janitorial and housekeeping, printing operations, groundskeeping, vehicle maintenance, and lodging.[234]

The GSA also says reverse auctions work best for "high dollar" purchases—those of at least $500,000—because of the time needed to prepare, the administration costs, economies of scale, and volume discounts.[235] Yet some of the Army's auctions have been for total dollar values of less than $10,000, including one for five fax machines with a beginning total cost estimate of $2500 and a final price of $2200—a savings of only $300.[236]

Despite the conflicting views, agencies are not totally bereft of guidance on when reverse auctions are appropriate. The Air Force's research gleaned three baseline prerequisites from corporate-sector experience that apply no matter what the type of procurement: "The presence of a number of competent, competitive suppliers;[237] the presence of a clearly defined requirement that competitors find attractive; and management support for changing suppliers if needed."[238]

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232. GSA GUIDE, *supra* note 12, at 9.

233. *See id.*; Robert L. Neuman, *The Basics About Reverse Auctioning*, PURCHASING TODAY, Nov. 2001, at 18 ("Anything that you can describe well can be reverse-auctioned. This includes goods and services. The key is that the item must be discrete—that it has features that are well-measurable."), http:www.ism.ws/Pubs/ISMMag/110118.cfm. In the SBA auction for construction services, each participant conducted a pre-bid inspection. Additionally, the auction provider ensured that all bids complied with access requirements of the Americans with Disabilities Act. PR Newswire, *FedBid.Com*, *supra* note 39.

234. *See* GSA, *Buyers.Gov*, *supra* note 94 (News & Links, Question & Answer No. 2); GSA GUIDE, *supra* note 12, at 9 (also suggesting operating 24-hour communications centers and conference facilities); AF REVERSE AUCTION POLICY STRATEGY, *supra* note 152, No. 10 (contending that agencies should seriously consider reverse auctions for services that are available in the commercial marketplace); AMS & FREEMARKETS, *supra* note 81, attachment A (listing thirty-eight services it considers potentially appropriate for online public auctions).

235. GSA, *Buyers.Gov*, *supra* note 94 (News & Links, Question & Answer No. 30); GSA GUIDE, *supra* note 12, at 4, 8. Most GSA auctions were for procurements of at least $1 million. GSA GUIDE, *supra* note 12, at 10; *see also* Merson, *supra* note 16, at 14 (asserting that experience has shown that reverse auctions work best for "large dollar-value auctions for individual agencies (or) aggregated small buys for multiple users"); *cf.* Harris, *supra* note 120 (quoting some government officials as saying vendors will not want to compete for small buys).

236. *See infra* Appendix 1.

G. Mom and Pop and Farmer Bob in Cyberspace

The type and dollar value of a procurement used in a reverse auction also will affect who the bidders are, especially when it comes to small businesses. Opinions vary widely about whether reverse auctions will open up new territory to small businesses or create even more barriers to their full participation. Some say the technology investment and expertise are so formidable that small businesses either cannot or will not be part of reverse auctions.[239] Others fear that dominant contractors may force competitors out of the market[240] and that "Mom and Pop" vendors may find reverse auctions difficult.[241]

Such worries underestimate the extent to which the computer age has pervaded business and the equalizing impact of online transactions. "The Internet in particular is helping to level the playing field among large and small businesses . . . by making it easer and cheaper for all businesses to transact business and exchange information."[242] After all, bidding in a reverse auction requires only a computer and a telephone line, equipment

237. Both Army and Navy officials also said they had found that reverse auctions with only two suppliers were at risk for unsatisfactory results. Ellis Interview, *supra* note 23; Meinert Interview, *supra* note 40; *see also* Thomas Interview, *supra* note 118 ("We start to get nervous when there are just two (bidders), although we have done a number of successful auctions with only two."); AF REVERSE AUCTION POLICY STRATEGY, *supra* note 152, No. 5 (asserting that "using RA for an acquisition with less than three participants should not be viewed as a smart business decision"). The CECOM's spreadsheet shows several instances in which only one vendor actually "showed up" to participate in the auctions. In those cases, obviously, the starting price was also the winning bid and the customer realized no savings. *See infra* Appendix 1.

Yet the Army's statistics also show that the number of suppliers guarantees neither success or failure. In one auction for eyepiece assemblies, only two vendors participated—but the final bid was $228,500, a fifty-two-percent savings off the starting price of $550,000. On the other hand, four suppliers came to bid on computer systems for the State Department, but none was willing to offer anything less than the starting price. *Id.*

238. Scott Memo, *supra* note 110, attachment, at 1. The DAU offers similar guidelines: The presence of an "established competitive environment," which reduces the risk to both the contractors and the agency; the ability to determine a baseline starting price; a well-defined specification—again, reducing the risk to both sides; and true cost savings from the auction—including the "hidden" costs such as the auction expenses and the costs of possibly changing suppliers. Smith Presentation, *supra* note 22, slide 38.

239. Merson, *supra* note 16, at 5.

240. Smith Presentation, *supra* note 22, slide 15.

241. *Id.* slide 32.

242. Merson, *supra* note 16, at 5-6 (quoting ECON. & STATISTICS ADMIN., U.S. DEPT. OF COMMERCE, DIGITAL ECONOMY 2000 (June 2000)).

that is well within the reach of most homes in America, not to mention practically every business.[243]

In the Army's experience, an estimated sixty to sixty-five percent of the auction winners have been small businesses.[244] During the reverse auction for goats, "there were guys in their barns logged onto AOL bidding"[245]—farmers who knew more about auctioning than Army officials did, thanks to their long experience with livestock auctions.[246] In the Navy's auction pilot, small businesses captured four out of five contracts and secured an estimated twenty-five percent of the contracts since then.[247]

Small businesses may actually be better equipped to take advantage of the split-second decision-making required by reverse auctions. A smaller firm can have all its top decision-makers in the same room during an auction, allowing them to react immediately to the bidding action. Huge corporations that have officers scattered across the country may not be capable of such flexible responses.[248]

Ensuring that small businesses are able to participate in reverse auctions may take some extra effort on the part of contracting officers but no more so than traditional small business set-asides or similar programs. When the Army Forces Command conducted its first reverse auction, buying forty computers at Fort Hood, Texas, it did so with only small or small disadvantaged businesses.[249] The Army researched the market using existing GSA computer-equipment supply schedules to identify appropriate candidates.[250] When a Navy customer held a reverse auction for wooden

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243. *See* GSA GUIDE, *supra* note 12, at 13 ("Reverse auctions are small-business friendly since you need only a Web browser to participate in e-commerce."). For example, FreeMarkets "BidWare" software for reverse auctions needs only an IBM-compatible, Pentium-class personal computer, a modem capable of transmitting at 28.8 kilobytes per second, and thirty-two megabytes of random access memory. Joshua A. Kutner, *Navy Boards Online Auction Boat*, NAT'L DEF., June 2000, at 23.

244. Meinert Interview, *supra* note 40.

245. Harris, *supra* note 215 (quoting Eric Levin, vice president of marketing for Frictionless Commerce, the software provider for the auction).

246. Meinert Interview, *supra* note 40.

247. Ellis Interview, *supra* note 23.

248. *Id.* (pointing out that small businesses may in fact have an advantage over larger companies).

249. *FORSCOM's First Reverse Auction Conducted at Fort Hood*, ARMY ACQUISITION REFORM NEWSLETTER (U.S. Army Acquisition Corps), Sept. 26, 2000, at 1.

250. *Id.* Auction preparations took about six days, but the Army made the delivery order award on the same day as the auction. *Id.*

pallets, it wanted to ensure that long-time Amish suppliers could continue to compete. To accommodate the Amish vendors' religious beliefs, which prohibit the use of electronic equipment, FreeMarkets provided surrogate verbal bidding.[251]

Additionally, the transparency of online auctions—the fact that bidders "can see why they won or lost in real time because it's right there on the screen"[252]—may actually enhance small businesses' faith in the government procurement process. The GAO recently criticized the DOD for failing to adequately compete multiple-award contracts and procurements for information technology products.[253] Yet one of the advantages of a reverse auction is the "increased participation in bid activity and access to new suppliers and markets."[254] Reverse auctions, at a minimum, give the appearance of being more fair and open, offering small businesses a chance to pick up contracts that might ordinarily go to the agency's preferred vendor among existing IDIQ contracts or supply schedules.[255]

H. But What About Everything Else?

Even if reverse auctions are small-business friendly, how does the agency go about applying other socioeconomic preferences?[256] The

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251. Thomas Interview, *supra* note 118. Another way of "spreading the wealth" in a reverse auction is to break procurements into lots or other logical groupings of the items. Not only does this sometimes simplify the acquisition, it allows the agency to award contracts to multiple vendors. For example, in the first DFAS auction, three companies won contracts for four lots—two very large companies, Gateway Computers and Micron Computers, and one small business, SR Tech. GSA GUIDE, *supra* note 12, at 18.

252. Meinert Interview, *supra* note 40; *see also* GSA, *Buyers.Gov*, *supra* note 94 (News & Links, Question & Answer No. 33) (stating that reverse auctions give small businesses an unmatched ability to receive "immediate real-time market data on the pricing of their goods and services").

253. *See* GAO, DEFENSE ACQUISITIONS, *supra* note 117, at 19-20 (noting in that as many as seventy percent of the contracts studied, the DOD organizations failed to give contractors "a fair opportunity to be considered").

254. Smith Presentation, *supra* note 22, slide 12; *see also* GSA GUIDE, *supra* note 12, at 1 (claiming that reverse auctions open up competitions to suppliers who might not have been allowed to participate under methods such as the "standard 'get three quotes' model"); GSA, *Buyers.Gov*, *supra* note 94 (News & Links, Question & Answer No. 33) (maintaining that reverse auctions will enhance small businesses' ability to find and respond to government procurement opportunities).

255. Meinert Interview, *supra* note 40; *see also Air Force "Aims High"*, *supra* note 61, at 7 (asserting that participants in reverse auctions gained the assurance that "the government is not simply selecting its favorite suppliers").

answer, according to those with experience in the process, is exactly the same way the agency would satisfy those requirements in a traditional contract—"anything you can do offline, you can do online."[257] GSA guidance adds:

> Government reverse auctions are like any other government procurement. A Reverse Auction is merely a different way of negotiating and arriving at a fair and reasonable price through dynamic pricing. The requirements of the procurement process do not change with the use of reverse auctions. The applicable FAR clauses, whether they pertain to—say—the Buy American Act (BAA) or the Trade Agreements Act (TAA), small business participation, or another area, will be in, or be referenced in, the solicitation.[258]

In fact, "nothing has changed" could well be the motto for DOD procurement officials involved with reverse auctions. Reverse auctioning, they say, is a contracting *tool*, not a new *kind* of contract, so "[r]egardless of the method of acquisition and price strategy, the fundamental philosophy and policy do not change."[259]

That maxim, however, oversimplifies reality. If, for example, reverse auctions are treated as discussions over price, how is the socioeconomic preference actually factored in? The GSA has suggested using some type

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256. *See* McCaleb, *supra* note 75, at 3 (contending that the method of applying socioeconomic policies in a reverse auction is still unresolved); Merson, *supra* note 16 (stating that reverse auctions' impact on social and economic procurement programs has yet to be determined).

257. Thomas Interview, *supra* note 118; *see also* Meinert Interview, *supra* note 40; Ellis Interview, *supra* note 23 (both asserting that contracting officers apply the same procedures in reverse auctions as they would in traditional procurements).

258. GSA GUIDE, *supra* note 12, at 9; *see also* Vuxton Presentation, *supra* note 224, slide 8 ("The auction should be seen as a complement to the procedures that are already in place for conducting . . . acquisitions—not a method to skirt" FAR requirements.); Merson, *supra* note 16, at 7 (warning against using reverse auctions to avoid required suppliers such as nonprofit agencies employing people who are blind or severely disabled or the Federal Prison Industries); ACC *Reverse Auction Tacklebox*, *supra* note 21 ("As always, depending on the dollar threshold, socioeconomic considerations . . . must still be considered."); Smith Presentation, *supra* note 22, slide 32 (asserting that one of the lessons learned through reverse auction use is that socioeconomic goals can be fulfilled).

259. Boykin Presentation, *supra* note 22, slide 17; *see also* Thomas Interview, *supra* note 118 ("The same rules apply—we're just changing how negotiations happen."); GSA GUIDE, *supra* note 12, at 4 ("The laws and government regulations that apply to ordinary acquisitions also apply to reverse auctions.").

of "weighted bid model" or "bid modifiers" *after* the auction ends to take into account such things as socioeconomic preferences.[260] Yet, as discussed above, one of the much-ballyhooed advantages of reverse auctions is the instant feedback it gives bidders, telling them immediately how they rank against other participants. Coupled with the fact that the bidders are anonymous (and presumably do not know if they are competing against, for example, a woman- or minority-owned business), an *ex post facto* weighting does not accurately reflect a bidder's auction standing.[261]

Granted, bidders face this same dilemma in a traditional procurement, but acquisition officials do not tout the immediate transparency of paper-based contracting. While there is nothing inherently wrong with weighting bids after the auction ends, it does degrade the accuracy of the real-time feedback.

V. Conclusions and Recommendations

Even the most vocal critics seem to realize that e-commerce, including reverse auctions, is here to stay.[262] Some observers say that the "Internet Revolution" is a technological revolution similar to—but far faster-paced and intense than—those prompted by innovations such as the steam engine, the telephone, and the television. In their eyes, society is on the cusp of an unprecedented historical transformation from an economy

260. GSA GUIDE, *supra* note 12, at 5-6.

261. *See* McCaleb, *supra* note 75 (suggesting that perhaps the socioeconomic preference should be applied through software that adjusts the price in real time "so that offerors are aware of the 'real' bid against which they are competing"). The DSCC's DIBBS provides a public, real-time abstract of all qualifying bids that includes not only total quoted prices, but also "other factors that could affect price evaluation," such as the Buy American Act. DIBBS AUCTION USERS GUIDE, *supra* note 42, at 4. *See also supra* notes 216-17 and accompanying text (discussing real-time weighting and ranking of bids in best value procurements).

262. *See* Rector, *supra* note 211 (calling for public debate to put appropriate limits on federal reverse auction use, but acknowledging that "the concept of e-acquisition has clearly arrived"); Plexico, *supra* note 131 (recognizing that while many suppliers dislike reverse auctions, "they are likely to be a permanent addition to the toolbox of government acquisition professionals"). The GSA certainly anticipated banging the reverse auction gavel frequently in the next few years. The agency's solicitation for reverse auction services gave an estimated annual number of auctions for the contract's first two years: fifty for dollar amounts between $500,000 and $2 million, seventy-five for $2 million to $5 million, and 100 for more than $5 million. The estimate for the third year (first option year) increases by twenty percent. *See FedBizOps.gov*, *supra* note 38 (Solicitation No. 7TS-01-0001).

where e-commerce is an enhancement of traditional business methods to the point where it becomes "simply the way things work."[263]

A. Where Do We Go from Here?

Given that baseline prediction, the appropriate tack each federal organization should take is not *if* it will be doing reverse auctions, but *how and when* it should be doing them to best serve its own specialized needs and customers. In addition to those mentioned above, a plethora of solutions abound for every problem and potential issue. Evaluating every one is beyond this article's scope. The possible responses, however, can be simplified and summed up in two opposing points of view: legally binding FAR provisions or agency-developed policy guidance.

Some say the lack of regulatory guidance makes agencies and contractors skittish about using reverse auctions.[264] They say agencies especially need guidance to settle the issue of whether reverse auctions are legal and, if so, to ensure they do them properly.[265] "Rather than have people read between the lines, just come out and say it," because without that definitive guidance, some agencies will always hesitate to commit to something new.[266]

Additionally, besides calling for FAR language to explicitly permit reverse auctions, the ABA told the FAR councils that it also wants to see FAR revisions address the following topics:[267] writing reverse auction solicitations, complying with the PIA, allowing for an alternative Certificate of Independent Price Determination,[268] handling mistakes in bids, underbidding or buying-in, and identifying situations where reverse auc-

263. WYLD, *supra* note 14, at 41.

264. Davidson, *supra* note 118 (quoting Ina Merson, an acquisitions consultant and former Department of Commerce contracting officer, as saying reverse auctions "are not catching on now because there is no guidance for their use," a sentiment echoed by Deidre Lee, director of DOD procurement, who said agencies and contractors need more guidance).

265. Telephone Interview with Thomas F. Burke, Attorney, McKenna & Cuneo (Feb. 7, 2002) [hereinafter Burke Interview]. Mr. Burke is vice chair of the Commercial Products and Services Committee of the ABA's Public Contract Law Section, which submitted the ABA's comments to the FAR councils. His firm handled the bid protest (later withdrawn) of the Navy's first reverse auction. *Id.*

266. *Id.*

267. ABA Letter, *supra* note 77.

268. *See infra* note 281.

tions are appropriate "without precluding the use of reverse auctions in other situations."[269]

Those calling for guidance recognize that "a certain amount of trial and error is necessary" in learning to use new acquisition tools.[270] But, the argument goes, "the downside of any experiment is that if you don't get it right," the costs—in time, labor and dollars—can wipe out any benefit.[271] Additionally, without firm guidance, reverse auctions are likely to prove a fertile breeding ground for protests, especially as agencies branch out into more complex procurements.[272]

The Air Force, on the other hand, does not seem to believe that regulatory changes are needed in *any* area except for perhaps the relationship of reverse auctions to sealed bidding, where it "may be the right time and environment for a total 'rethink' of Part 14."[273] In its opinion, policy guidance—not regulation—can adequately address all of the following issues: determining reverse auction pricing policies and analysis; ensuring price independence and integrity; promoting full and open competition; publicizing and planning for reverse auctions; making responsibility determinations; deciding when reverse auctions are appropriate; using reverse auctions in both best value acquisitions and when accepting the lowest-price, technically acceptable offer; and promoting small-business participation.[274]

The argument behind the Air Force position is that the federal government cannot fully realize reverse auctions' untapped potential if it is fettered by too much regulation.[275] "'Try it, test it, do it,' should be the mantra of the public sector in regards to the application of all e-commerce concepts, including the auction model."[276]

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269. ABA Letter, *supra* note 77.

270. Burke Interview, *supra* note 265.

271. *Id*.

272. *Id*.

273. AF REVERSE AUCTIONING POLICY STRATEGY, *supra* note 152, No. 11. FAR Part 14 covers sealed bidding.

274. *See generally id.* (listing each of these positions in relation to specific FAR provisions).

B. Less Is More When It Comes to Regulation

1. Learn by Doing

The arguments for binding regulations carry some validity. After all, while reverse auctions can benefit the government significantly, they also seem to offer breathtaking potential for new and unlimited ways to really botch up an already complex process. As one skeptic wrote in August 2000, "If the Office of Federal Procurement Policy is even thinking about drafting reverse auction regulations, it should do so in Internet time. A lot of damage could occur in, say, 18 months."[277]

Yet here things are, twenty-four months later—and where is the damage? Two bid protests, both denied. Savings totaling millions of dollars.[278] Happy agency customers who have been able to adapt reverse auctions as they desire, to use or not to use. Procurement times often cut

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275. *See, e.g.*, Meinert Interview, *supra* note 40 (asserting that the DOD experience with reverse auctions is still too new for heavy regulations to be appropriate—"we're still in the infancy with this"); Merson, *supra* note 16, at 11 (reporting that the consensus at a GSA-sponsored reverse auctioning conference in August 2000 favored eliminating FAR "impediments" over issuing regulations that "might constrain innovation"). Professor Wyld cautions:

> Almost every agency at all levels of government will find that they have guidelines in place that will either hinder or completely prevent involvement in the emerging marketplaces. . . . These guidelines, along with the legislation and regulations behind them, will need to be updated, if not completely revised and "downsized" for the New Economy.

WYLD, *supra* note 14, at 45.

276. WYLD, *supra* note 14, at 54. One student of the Army's reverse auction program concluded:

> The procedures for using a reverse auction strategy are still developing. . . . The process is simply still evolving. . . . Any statutory or policy implementation restricting innovation with this process will have detrimental effects on its usefulness. The best recommendation is to let the process evolve into a well-defined procedure before considering any policy regarding its use.

Stephens, *supra* note 160 (manuscript at 66-67).

277. Ryan, *supra* note 76.

significantly. Not even any anecdotal evidence (let alone hard statistics) that reverse auctions are the contracting doomsday the critics predicted.

Most of the alleged problems appear to be solving themselves. Case law and the majority of published opinions seem to come down squarely on the side of legality for reverse auctions. Small businesses appear to be right in the thick of the bidding wars.[279] Government buyers don't seem to be complaining about performance deficiencies after underbidding.[280] The threat of collusion is no greater than in the traditional world.[281] As contracting officers and others gain reverse auction experience, sloppy specifications should become rarer. [282] Because the government cannot seem to avoid this problem entirely in *traditional* contracting, there is no reason to expect—or demand—that it do so in e-procurement.

Agencies seem to recognize that they cannot allow focus on price to run roughshod over obtaining quality products. The "best value contin-

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278. However, it remains to be seen whether these low prices are simply one-time good deals. If a reverse auction truly drives prices to their absolute market lows, then it seems unlikely that follow-on procurements will realize similar savings. *See* Nick Wakeman, *Feds Shift Reverse Auctions into Gear*, WASH. TECH., Aug. 14, 2000 (suggesting that after the first year, "the rate of savings drops"), http://www.washingtontechnology.com; *Business Down? Reinvent Purchasing*, PURCHASING MAG. ONLINE, Mar. 8, 2001 (quoting former Chrysler Motors president Thomas Stallkamp as saying he doubts reverse auction savings are permanent), http://www.manufacturing.net/pur/index.asp?layout=archiveTOC. Without more long-term reverse auction data to evaluate (including contracts that have run to completion), the jury is still out on that question.

279. Not only are small businesses participating as bidders, but also as auction providers. Out of nine companies that initially participated in various GSA online procurement programs as enablers, five were classified as small—including two small disadvantaged businesses (one also woman-owned). Merson, *supra* note 16, at 10-11. All four companies that received awards for GSA's new reverse auction program are classified as small. Again, two of those are disadvantaged, and one is also woman-owned. GSA, *IT Solutions*, *supra* note 38.

280. Admittedly, however, with just more than two years having elapsed from the first DOD reverse auction awards, it simply may be too soon to make an accurate assessment on this issue as well. At least one private-sector reverse auction user apparently met with unsatisfactory results. Aerospace contractor Pratt & Whitney reportedly had to terminate a reverse-auction contract for aerospace parts after a year of substandard performance from the winning bidder. Pratt & Whitney then had to pay significantly more to get the parts from its previous supplier. *Online Reverse Auctions Create Two Procurement Camps*, PURCHASING MAG. ONLINE, Mar. 21, 2002 (quoting former company commodity manager David Stec), http://www.manufacturing.net/pur/index.asp?layout=archiveTOC.

uum" in reverse auctions does not seem to differ that much from traditional procurements. As the FAR explains:

> An agency can obtain best value in negotiated acquisitions by using any one or a combination of source selection approaches. In different types of acquisitions, the relative importance of cost or price may vary. For example, in acquisitions where the requirement is clearly definable and the risk of unsuccessful contract performance is minimal, cost or price may play a dominant role in source selection. The less definitive the requirement, the more development work required, or the greater the performance risk, the more technical or past performance considerations may play a dominant role in source selection.[283]

All that is equally true whether using reverse auctions or paper-based negotiations—and, again, as contracting personnel learn how to wield this new procurement tool, they will hone their ability to successfully traverse the continuum.[284]

The acquisitions community lacks agreement on when reverse auctions are appropriate, but so what? The GSA and others may say that only high-dollar auctions bring in sufficient bang for the buck. But if Army acquisition personnel have found what they consider to be a satisfactory and economical way to conduct reverse auctions for small requirements

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281. After all, certain types of contracts have always required the offeror to provide a "certificate of independent price determination," certifying that he has not acted in collusion with anyone else in reaching his price. *See* FAR, *supra* note 24, at 52.203-2; *see also* AF REVERSE AUCTION POLICY STRATEGY, *supra* note 152, No. 4 (asserting that this section provides the security and guidance needed to prevent collusive bids).

As with consent to disclose bidders' prices during the auction, however, this certification often is implied solely from the offeror's participation in the auction. The Navy informs bidders as follows: "Submission of a proposal by the offeror shall be considered certification by the offeror that the only knowing disclosure by the offeror of its prices to any other offeror will be during the CBE." AFMC *Reverse Auctioning*, *supra* note 95 (Navy sample Section L instructions, para. II.g). The Army advises essentially the same thing: "By participating in the reverse auction, offerors certify that the only knowing disclosure by the offeror of its prices to any other offeror will be during the reverse auction." *Id.* (Army sample instructions, para. I.f).

282. *See* NASH & CIBINIC, *supra* note 119, at 99 ("As with any tool, its use requires a certain degree of skill and knowledge on the part of the user.").

283. FAR, *supra* note 24, at 15.101.

284. *See* Harris, *supra* note 120 (predicting that as federal buyers become "savvier purchasers . . . (and) equip themselves with tools . . . such as reverse auctions, they will find ways to assure both best prices and best value").

(like a couple of fax machines), why should regulations tell them they cannot?[285] They are going to buy the fax machines one way or another;[286] leave it up to them to choose the appropriate method (just as the current regulatory regime does).[287]

If experience truly is the greatest teacher, it seems that allowing government agencies the leeway to figure out on their own when reverse auctions work and when they do not is preferable to regulations written by some bureaucrat who may never even have signed onto E-bay.[288] The key for contracting officers and agency customers is to go through the same analysis they would when deciding what type of method to use for any other procurement.[289]

For example, using reverse auctions to acquire construction services would seem to be pushing—if not exceeding—the limits of what is appropriate. But contracting officers apparently recognize that. Only a few

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285. *See* Stephens, *supra* note 160 (manuscript at 62) (noting that success in the reverse auctions he studied "was not limited to small or large acquisitions, nor did a relationship exist between the savings rate and the quantity required"). Additionally, requiring a minimum value for reverse auctions could also diminish small-business participation, since acquisitions with an anticipated value of more than $2500 but less than $100,000 are automatically reserved for small businesses. *See* FAR, *supra* note 24, at 19.502-2(a).

286. Even GSA acknowledged the reality that an estimated eighty percent of government procurement is for no more than $2500. Its answer was to set up online auctions that allowed government buyers to aggregate purchases, that is, combine them into one larger order. GSA, *Buyers.Gov*, *supra* note 94 (Reverse Auctions, Frequently Asked Questions No. 2).

287. As a case in point, the FAR and case law vest contracting officers with significant discretion in choosing the appropriate contract type. *See generally* FAR, *supra* note 24, subpt. 16.1, "Selecting Contract Types." For example, with a few exceptions, the agency may select any type or combination of types of contract for a negotiated procurement "that will promote the Government's interest." *Id.* 16.102(b). Contracting officers are expected to exercise "sound judgment" when selecting among the variety of types made available to give the agencies the flexibility to meet their needs. *Id.* 16.101(a), 16.103(a). Ultimately, selecting a contract type remains within the contracting officer's reasonable discretion. *See* Diversified Tech. & Servs. of Va., Inc., Comp. Gen. B-282497, July 19, 1999, 99-2 CPD ¶ 16 (leaving it to the agency to decide which type of pricing format to use).

288. *See* WYLD, *supra* note 14, at 17 (quoting Hal Varian, Dean of the School of Information Management and Systems at the University of California at Berkeley, as saying that "[t]he Internet is the greatest medium in the history of economics for testing all manner of hypotheses about which auctions work best under what circumstances").

289. Meinert Interview, *supra* note 40.

public reports of construction auctions have trickled in, and those all involved small-scale projects.[290]

The baseline issue that seems to underlie much of the controversy is how much one trusts contracting officers and other agency procurement staffers to do the right thing and to do things right.[291] One would like to think that, for the most part, well-trained, experienced, and conscientious professionals make up the acquisition corps.[292] Current procurement statutes grant them the ability to "exercise personal initiative and sound business judgment . . . to meet the customer's needs."[293] Until experience shows that agencies are incapable of properly exercising that initiative and

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290. *See supra* note 39 (discussing the SBA's modification auction). In June 2002, the Air Force Center for Environmental Excellence (AFCEE) held its first reverse auction, for a project building a motorized security fence at a New York facility. The winning bid after a forty-eight minute auction was $39,000. The AFCEE plans to use reverse auctions only on a limited basis for Environmental Minor Construction, Operations and Services (EMCOS) projects. In fact, AFCEE selected the EMCOS program for reverse-auction experimentation because it involves simple, small-dollar projects stateside. Press Release, Air Force Center for Environmental Excellence, In This Auction Lowest Bidder Wins (Aug. 1, 2002), http://www.afcee.brooks.af.mil/ms/newsreleases/auction.htm..

291. *See* Captain Doug Roark, Navy Supply Systems Command, Deputy Commander for Contracting Management, *Safety, Not Price, Was First in Reverse Auction*, GOV'T COMPUTER NEWS, Oct. 2, 2000, at 24, LEXIS ASAPII Publications—Federal Public Contracts (letter to the editor) (noting that reverse auctions are beneficial when conducted by "acquisition professionals").

292. *See generally* Michael Organek, U.S. Army Corps of Engineers, "Qualifications for Being a Contracting Officer or an Administrating Contracting Officer in the U.S. Army Corps of Engineers," Presentation at the Road Show 2000 of the U.S. Army Corps of Engineers, Principle Assistant Responsible for Contracting (undated PowerPoint presentation) (on file with author). Procuring Contracting Officers must have at least two years of experience and at least seven contracting-related courses. Administrative Contracting Officers must have four to five courses, depending on their warrant amounts, and two years contracting experience. Those with authority above $100,000 also must have a bachelor's degree with at least twenty-four credit hours in disciplines such as law, accounting, business, finance, economics, management, and contracts. *Id.*

Additionally, while it is risky to extrapolate much from the small number of reported reverse auction protests, the fact that the last two years have seen only two cases does suggest, at least minimally, that acquisition staffers are doing something right. *But see The Service Acquisition Reform Act of 2002: Hearing on H.R. 382 Before the House Comm. on Gov't Reform, Subcomm. on Tech. & Procurement Policy* (Mar. 7, 2002) (statement of Professor Steven L. Schooner, George Washington University Law School) (charging that so-called acquisition "reforms" of the 1990s resulted in an "overwhelmed, under-trained" acquisition workforce), *available at* http://www.house.gov/reform/tapps/hearings/3-7-02/SARAschooner.pdf.

293. FAR, *supra* note 24, at 1.102; *see also supra* notes 87-90 and accompanying text.

judgment with regard to reverse auctions, they deserve the right to "try it, test it, do it" without being hobbled by too much regulation.

2. The Question of Legality

Yet even with all those arguments, one area of potential regulation still seems to be eminently reasonable and easily doable: having the FAR unequivocally recognize the legality of reverse auctions. This would solve the split in opinions and assuage any lingering doubts that might be inhibiting use. The ABA wants only an "explicit statement that . . . reverse auctions are permitted provided they are conducted in accordance with all applicable laws and regulations and do not otherwise compromise the integrity of the procurement process."[294] Such a move seems unobjectionable and simple enough, yet upon closer examination, it would create more difficulties than it would solve.

What would it take, specifically, to satisfy the requirement that auctions be "conducted in accordance with all applicable laws and regulations and do not otherwise compromise the integrity of the procurement process?" The powers that be cannot add such a statement to the FAR or any other regulation without explaining it. And to explain *anything*, that explanation would have to address *everything*.

How does one avoid collusion and ensure price independence? Obtain consent? Find the proper level of automation? Handle technology problems? Draft good specifications? Prevent buying in, determine a fair price, and ensure quality performance? Limit auction costs? Make best value awards? Apply socioeconomic preferences? Determine when reverse auctions are appropriate? Can one do reverse auctions for sealed bids? For negotiated procurements? For services? For complex military unique items? For small-dollar buys? For construction? With only two bidders?

All these questions would have to be answered to ensure the auction would follow "all applicable laws and regulations" and maintain the integrity of the procurement process. And answers to all those questions are exactly what government users do not want.[295] Rather than heading off bid protests, such extensive regulation could actually engender challenges by providing more ways that unhappy bidders can attack the government's

294. ABA Letter, *supra* note 77.

actions. The more appropriate course of action is to leave the FAR unchanged (i.e., silent)—for now and for the most part—when it comes to reverse auctions.

C. Still, Nobody Is Perfect

Notwithstanding government's desire to avoid being hamstrung by intrusive regulation, some areas still need changes—both in policy and practice.

1. Our Bids Are Sealed

FAR Part 14 does need to be partially reworked to fully capture the reverse auction online bidding process.[296] Guidance from AFMC suggests that it makes no sense to try to force the square peg of reverse auctions to fit into the round hole of sealed bidding. Instead, AFMC says, the more logical course is to conduct reverse auctions as negotiated procurements.[297]

The flaw in this approach is the law's preference—in some cases, mandate—for sealed bidding. The Competition in Contracting Act (CICA) states that an agency *shall* solicit sealed bids: (1) if time permits; (2) the award will be made solely on the basis of price and price-related factors; (3) there is no need to conduct discussions with responding sources; and (4) the agency expects to get more than one sealed bid.[298]

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295. *See* Messmer, *supra* note 132 (reporting that although military officials anticipate some difficulties implementing reverse auctions, "they don't want the OMB, Pentagon or U.S. Congress, which all have the power to dictate procurement rules, to butt in").

296. *See supra* notes 72-75 and accompanying text.

297. AFMC ATTORNEY'S GUIDE, *supra* note 74, at 37 (concluding that negotiations work much better because they "allow enough flexibility to be very similar to sealed bidding procedures, but allow iterative price changes").

298. *See* 10 U.S.C.S. § 2304(a)(2) (LEXIS 2002). Negotiated procedures are authorized *only if* sealed bidding is inappropriate. *See id.* § 2304(a)(2)(B); Racal Filter Tech., Inc., 70 Comp. Gen. 127, 90-2 CPD ¶ 453 (Dec. 4, 1990) (holding that the CICA prohibits an agency from using negotiated procedures when all the elements the CICA enumerates for sealed bidding are present).

With the sole added wrinkle of successive bids, all those factors apply to many reverse auctions, especially for commodities.

How would the government buy toilet paper in bulk in traditional procurements? With sealed bidding. The DOD needs to be able to do so with a reverse auction as well.[299] Given the additional requirements of negotiated procurements (such as debriefs of unsuccessful offerors, if requested[300]), depriving agencies of the option of sealed-bidding methods does not make sense. Instead, the better solution is revising FAR Part 14 (specifically, FAR 14.202-8 dealing with electronic bids) to allow for successive bids in a reverse auction context.[301] The revision need not be lengthy nor complicated. In fact, it conceivably could require just a simple, concise clarification that bidders may submit successive electronic bids in reverse auctions.

2. Just the Facts, Ma'am, Just the Facts

Although experience seems to suggest that reverse auctions do not disadvantage small businesses, some hard-and-fast statistics to back up the anecdotal evidence could prove beneficial. Gathering such figures might take no more than a concerted, formalized, DOD-wide effort to simply track the numbers. Perhaps the value may be simply in silencing any fears about small business participation, or it may point out a problem that no

299. *See* AMS & FREEMARKETS, *supra* note 81, at 2 (asserting that auctions are ideal for sealed bid contracts).

300. FAR, *supra* note 24, at 15.506.

301. Some argue that a FAR Part 14 revision also needs to address the issue of safeguarding bids. *See* Palmer et al., *supra* note 69, at 6 (contending that this requirement is one reason sealed bidding reverse auctions are problematic); AF REVERSE AUCTIONING POLICY STRATEGY, *supra* note 152, No. 11 (asserting that this is an issue relative to sealed bidding in the reverse auction environment). The FAR requires, however, that bids received *before the time of bid opening* be safeguarded. *See* FAR, *supra* note 24, at 14.401. In a reverse auction, bid *receipt and opening* are essentially *simultaneous*, so there is no need to safeguard the bids in the traditional sense. Instead, "safeguarding" bids would seem to more appropriately involve protecting against the looming hazard of a hacker or other security compromise—an e-commerce requirement no matter what the type of procurement. *See* Merson, *supra* note 17, at 6 (maintaining that the auction enablers must guarantee tamperproof online systems); William Matthews, *Bold New Bid*, FED. COMPUTER WEEK, Apr. 17, 2000 (warning of the "ubiquitous computer concern" of security), http://www.fcw.com/fcw/articles/2000/0417/cover-04-17-00.asp.

one knew existed—but regardless of the results, DOD ought to do the analysis.[302]

3. Sign on the Dotted Line

Implied consent may be fine for agreements to monitor use of government telephone systems and taking breath samples from suspected drunk drivers, but not for reverse auctions. Obtaining bidders' consent to reveal their offers during a reverse auction appears to be fundamental to ensuring the auction's legality. Consequently, consent needs to be express, fully informed, and unequivocal, which means in writing and individually obtained, not just presumed from participation.[303]

Although the GAO has upheld the use of implied consent, when one factors in the very minimal added burden of obtaining unequivocal express consent, the cost-benefit analysis clearly favors doing so. In most reverse auctions today, bidders are submitting advance proposals, receiving up-front training, or both, so requiring them to sign an informed consent form seems unlikely to add to the time or effort needed to conduct the auction. Certainly, little danger exists of stifling innovation or hampering development.

The same holds true for the certification of independent price determination, aimed at avoiding collusion in certain procurements. Admittedly, the added step of certifying in writing that "I am not a crook" probably will not deter a contractor who is going to cheat the system by engaging in price fixing. Still, it serves as one more potential check. Additionally, most attorneys would probably prefer an explicit certification of

302. *See* Stephens, *supra* note 160 (manuscript at 67) (recommending further research to analyze how reverse auctions impact contractors, especially small and disadvantaged businesses).

303. Written consent would also help address the issue of true voluntariness. *See supra* notes 97-98 and accompanying text. When someone waives his rights after being fully informed what he is waiving and what his options are, and he acknowledges such disclosure and his resulting waiver in writing, reviewing bodies are far more likely to declare such a waiver truly voluntary than one in which the reviewer must assume or presume a knowing waiver. On the other hand, the argument that requiring consent to participate somehow negates the voluntary nature does not seem especially compelling. As the 800-pound gorilla of public contracting, the government sets similar prerequisites to participation all the time.

non-collusion rather than an implied one if they had to attempt a criminal prosecution or civil recovery.

4. Man over Machine

The DOD should closely scrutinize and possibly rein in the DSCC's use of automated contract award and any similar attempts at full automation. No matter how valuable the computer is as a labor-saving tool, it (just like reverse auctions) is only that—a tool a human being must wield. Failure to do so jeopardizes the validity of the resulting contract awards.

The DIBBS Auction Users Guide explains "that the apparent low quote may not receive the award due to the application of price related evaluation factors and/or price reasonableness and responsibility determinations."[304] Consequently, the guide advises vendors to submit bids even if they cannot beat the apparent low offers. The subsequent "threshold responsibility and price reasonableness" determination is then frequently made by DSCC's "Procurement Automated Contract Evaluation (PACE)" system.[305]

The FAR-mandated "responsibility" judgment involves evaluating a prospective contractor's financial resources; ability to comply with the government's required performance schedule; past performance; integrity and business ethics; experience, organizational structure, and technical skills; and production, construction, and technical equipment and facilities.[306] What kind of computer evaluation system can assess a company's business ethics and integrity? The FAR implies that it cannot, by specifying that only the contracting officer can do that job: "No purchase or award shall be made unless the contracting officer makes an affirmative determination of responsibility."[307] Before making that determination, "the *contracting officer* shall possess or obtain information sufficient to be satisfied that a prospective contractor currently meets the applicable standards."[308]

A recent case illustrates why over-automation is potentially so dangerous. On 5 March 2002, the GAO decided *Standard Register Co.*,[309]

304. DIBBS AUCTION USERS GUIDE, *supra* note 42, at 4.

305. *Id.*

306. *See* FAR, *supra* note 24, at 9.104-1 (delineating the general standards for determining responsibility).

307. *Id.* 9.103(b).

308. *Id.* 9.105-1(a) (emphasis added).

rejecting a printing company's claim that the government improperly determined it was nonresponsible.[310] The GAO said:

> A contracting agency has broad discretion in making responsibility determinations, since the agency must bear the effects of any difficulties experienced in obtaining the required performance. Thus, a contracting officer has the discretion to determine the weight to be accorded the information he or she receives . . . . Although responsibility determinations must be based on fact and reached in good faith, they are of necessity a matter of business judgment. We will not question a nonresponsibility determination absent bad faith on the part of agency officials or the lack of reasonable basis for the determination.[311]

A computer cannot exercise the "broad discretion" or "business judgment" needed to make a responsibility determination. Lacking this, a computerized responsibility determination also quite possibly lacks a "reasonable basis," making automated evaluations vulnerable to sustained protests. Are the time and labor savings worth that risk?

5. Getting It All Together

Procurement officials at the DOD level should seriously consider providing some type of *discretionary* guidance on reverse auctions, perhaps something similar to the *Commercial Item Handbook* published by the acquisitions community in the Office of the Secretary of Defense.[312] Far too little of the existing guidance is up-to-date and available to acquisition staffers everywhere.[313] Right now, finding needed guidance often depends too much on knowing the right Web address, typing in the right words for the Internet search, or, perhaps, just the sheer dumb luck of stumbling across a Web site. At a minimum, DOD should integrate guidance into an

309. Comp. Gen. B-289579, Mar. 5, 2002.

310. *Id.*

311. *Id.* (citations omitted).

312. *See supra* note 107.

313. *See* Stephens, *supra* note 160 (manuscript at 66) (recommending that the Army issue a reverse auction users' guide to fill this void).

easy-to-find, simple-to-use source, either in paper or on the Internet, or preferably both.

Such a one-stop resource would make life easier for both government buyers and contracting officers. Equally important, headquarters-level consolidated guidelines might also dampen some of the cries for binding regulation and provide direction in areas of uncertainty. But because such guidance would not be mandatory, it should not impede agencies' innovation and flexibility.

VI. Conclusion

While the government may not be using reverse auctions to buy brides, the process does seem to marry up well with many aspects of military procurement. Those organizations that have stepped up to the reverse auction block frequently have left with significant savings in scarce procurement dollars, often accompanied by reduced acquisition periods. Not everyone has found reverse auctions to be a perfect match, but that is to be expected and as it should be. Each agency should be able to exercise its FAR-given discretion and choose the procurement tool that best suits its needs and specific acquisitions.

Reverse auctions also appear to have won their bid for acceptance as legal, albeit grudgingly in some cases. Although there have been some false starts, agencies seem to be acquiring the knowledge and experience to conduct auctions in appropriate cases and in appropriate ways. For now, the law should allow agencies to pioneer innovative methods of using auctions without the rigidity of extensive and all-encompassing FAR regulation.

That does not mean, however, that reverse auctions should be wide-open free-for-alls. Procurement officials need to closely monitor several concerns to ensure they do not become significant problems: the health of the supplier base; underbidding and performance results; technology issues, including the extent of automation and costs; the interplay of price and quality and doing best value acquisitions; appropriate use, to include acquiring services; and applying socioeconomic preferences. Additionally, the DOD acquisitions community should require explicit non-collusion certifications and consent to disclose prices, as well as issuing consolidated, headquarters-level guidance. Finally, the FAR councils should consider revising FAR Part 14's provisions for electronic bids in

sealed bidding as simply and minimally as possible to accommodate reverse auctions an successive bids.

Government procurement truly is undergoing an "e-volution" of historic proportions. Reverse auctions are not a panacea for all that ails the contracting world, but they are an extremely valuable tool that acquisition staffers must have both the flexibility and the know-how to wield. As they do, they will find that there is nothing illusionary about the power of the virtual gavel.

Appendix I

CECOM Reverse Auction Results Through February 2002

(QTY) PRODUCT/ITEM	DATE	ESTIMATED/BEGINNING PRICE	#VEN	WINNER	PURCHASE PRICE	DELTA/ SAVINGS	% SVGS	USER	$2,173,358.68
(1) Ricoh Secure Fax System, TEMAIR Edgar Utilities Software, toner/ items.	05/17/00	$6,891.00	2	Video & Telecommunications, Inc.	$5,511.00	$1,380.00	20%	CECOM	$1,380.00
(2) IBM Thinkpads	05/19/00	$7,000.00	3	Comteq Federal	$3,280.00	$3,720.00	53%	CECOM	$7,460.00
(5) IntelliFAX-2750	07/13/00	$500.00	2	Video & Telecommunications, Inc.	$440.00	$60.00	12%	CECOM	$300.00
(100) Connector plugs	07/24/00	$1,180.00	2	Autodyne	$780.00	$400.00	34%	CECOM	$40,000.00
(20) Pentium computers/items	08/03/00	$2,300.00	5	Micron	$1,850.00	$450.00	20%	AF	$9,000.00
(10) Pentium servers	08/03/00	$4,100.00	6	Dunn	$2,490.00	$1,610.00	39%	AF	$16,100.00
(135) Pentium computers/items	08/03/00	$1,900.00	5	Micron	$1,300.00	$600.00	32%	AF	$81,000.00
(140) Pentium minitowers/items	08/24/00	$1,900.00	4	Dell	$1,470.00	$430.00	23%	AF	$60,200.00
(40) Pentium computers/items	08/29/00	$1,500.00	4	Government Acquisitions	$1,340.00	$160.00	11%	AF	$6,400.00
(1) Photo-workshop	09/19/00	$7,000.00	1	GTSI	$7,000.00	$0.00	0%	AF	$0.00
(520) Pentium servers	09/19/00	$1,550.00	6	Dell	$1,120.00	$430.00	28%	FORSCOM	$223,600.00
(40) Pentium computers/items	09/21/00	$1,900.00	5	Dell	$1,470.00	$430.00	23%	FORSCOM	$17,200.00
(1) Lot Lumber	09/29/00	$17,000.00	3	Not identified	$15,400.00	$1,600.00	9%	SOCOM	$1,600.00
(100) Caprines (Goats/Livestock)	11/03/00	$130.00	5	Sarah Bunter/Farms	$100.00	$30.00	23%	USMC	$3,000.00
(1) Lexar PC Card Type II	11/09/00	$12,200.00	5	Not identified	$7,600.00	$4,600.00	38%	USMC	$4,600.00
(1) Lot Dishwasher (100 each)	12/08/00	$22,000.00	14	Washington Foundries	$15,700.00	$6,300.00	29%	USMC	$6,300.00
(1) Lot Waterheater (100 each)	12/08/00	$20,000.00	6	M.Learner	$12,200.00	$7,800.00	39%	USMC	$7,800.00
(140) Brake shoe 2530-00-602-5783	12/22/00	$815.00	3	Not identified	$700.00	$115.00	14%	TACOM	$16,100.00
(308) Hydrolic Wrench	01/19/01	$1,410.00	1	Stanley Hydrolic Tools	$1,410.00	$0.00	0%	TACOM	$0.00
(35) Collar Assembly Part	01/19/01	$145,425.00	7	BF Goodrich	$121,500.00	$23,925.00	16%	AF	$23,925.00
(200) Lot Office Supplies	01/19/01	$10,000.00	9	Shakir Enterprises	$6,000.00	$4,000.00	40%	USMC	$4,000.00
(1) Lot SUN equipment	02/15/01	$500,000.00	16	Not identified	$368,007.00	$131,993.00	26%	AF	$22,993.00
(40) Laptop computers	03/14/01	$4,650.00	3	Gateway	$2,700.00	$1,950.00	42%	5 SIGCMD	$78,000.00
(1) Lot SUN equipment/Msg Sys	03/21/01	$230,000.00	3	AVR Enterprises	$138,850.00	$91,150.00	40%	AF	$91,150.00
(1) Lot Appliances (Washer/Dryer)	04/05/01	$42,000.00	8	CPC Inc.	$33,600.00	$8,400.00	20%	USMC	$8,400.00
(109) Desktop Computers	04/06/01	$197,000.00	4	Dell Computers	$115,000.00	$82,000.00	42%	5 SIGCOM	$82,000.00
(1) Lot Paper	04/06/01	$43,000.00	22	Sita Business Systems	$37,328.00	$5,672.00	13%	USMC	$5,672.00
(1) Lot Sun Equipment & Services	04/19/01	$1,847,000.00	9	NIS Computers	$1,717,500.00	$129,500.00	7%	AF	$129,000.00
(1) Lot Sun Equipment & Services	04/25/01	$1,052,000.00	4	Dynasystems	$959,000.00	$93,000.00	9%	AF	$93,000.00
(1) Lot Eyepiece Assembly	04/27/01	$550,000.00	2	ITT	$261,500.00	$288,500.00	52%	CECOM	$288,500.00
(1) Lot Modular Office Furniture	05/24/01	$24,000.00	3	Allied Modular Building	$17,400.00	$6,600.00	27%	USMC	$6,600.00
(1) Lot Computer Systems	05/31/01	$149,000.00	4	STG, Inc.	$149,000.00	$0.00	0%	State Dept	$0.00
(1) Lot Wood Chips	06/13/01	$29,000.00	4	Buie Forest Products	$25,000.00	$4,000.00	14%	USMC	$4,000.00
(1) Lot Modular Office Furniture	06/22/01	$91,300	4	Allied Modular Building	$69,500.00	$21,800.00	24%	USMC	$21,800.00
(1) Lot Refrigeration Equipment	06/25/01	$36,000	5	Gill Marketing Company	$27,433.32	$8,566.68	24%	USMC	$8,566.68
(1) Lot Pump Assembly	06/29/01	$522,750	6	RGI, Inc.	$425,850.00	$96,900.00	19%	TACOM	$96,900.00
370 Desktop PCs - Energy Dept	07/05/01	$1,601	4	Force3, Inc.	$1,050.00	$551.00	34%	Energy Dept	$203,870.00
(1) Lot Dual Line Phones	07/25/01	$19,500	5	Cortelco	$17,100.00	$2,400.00	12%	USMC	$2,400.00
(1) Lot Metal Desks	08/01/01	$53,000	2	Commercial Concept Inc	$36,900.00	$16,100.00	30%	USMC	$16,100.00
6 HAZMAT Storage Buildings	08/16/01	$7,000	5	Safety Storage Inc	$4,795.00	$4,795.00	32%	TRADOC	$13,230.00
(1) Lot Projectors, Screens, etc.	08/24/01	$ 34,000.00	5	Total Audio Visual System	$28,550.00	$5,450.00	16%	TRADOC	$5,450.00
62 Monitors	08/31/01	$ 1,600.00	9	Micron Gov Computer Sys	$1,375.00	$225.00	14%	USCCE	$13,950.00
1 Lot Desktop Computers	08/31/01	$2,200,000	4	GTSI, Inc.	$1,800,000.00	$400,000.00	18%	Tobyhanna	$400,000.00
154 Desktop Pentium III	09/25/01	$1,376	9	Dell	$1,040.00	$336.00	24%	5th Signal	$51,812.00
									$2,173,358.68

JURY NULLIFICATION: CALLING FOR CANDOR FROM THE BENCH AND BAR

MAJOR BRADLEY J. HUESTIS[1]

It is not only [the juror's] right, but his Duty . . . to find the Verdict according to his own best Understanding, Judgment, and Conscience, tho in Direct opposition to the Direction of the Court.[2]

I. Introduction

This article addresses the controversial issue of jury nullification. *Black's Law Dictionary* defines jury nullification as a jury's "knowing and deliberate rejection of the evidence or refusal to apply the law either because the jury wants to send a message about some social issue that is larger than the case itself or because a result dictated by law is contrary to the jury's sense of justice, morality, or fairness."[3] It occurs when a jury returns a verdict of not guilty despite its belief that the accused is, in fact,

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2. 1 LEGAL PAPERS OF JOHN ADAMS 230 (L. Kinvin Wroth & Hiller B. Zobel eds., 1965).

3. BLACK'S LAW DICTIONARY 862 (7th ed. 1999).

guilty of the charge. In effect, the jury "nullifies" the charge because it believes the charge is either immoral or applied unfairly to the accused.

As the Court of Appeals for the District of Columbia noted in 1972, "The pages of history shine on instances of the jury's exercise of its prerogative to disregard uncontradicted evidence and instructions of the judge; for example, acquittals under the fugitive slave law."[4] Although military panels differ somewhat from civilian juries, both have the power to nullify the law.[5]

There are many circumstances under which jury nullification may be an issue in a military trial.[6] Imagine, for example, a court-martial of a soldier who refuses to take anthrax shots. Other soldiers in the command, whose earlier refusals were widely publicized in the local media, received nonjudicial punishment and administrative separation for their misconduct. Now, fearing the continuing press coverage will somehow discredit

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4. United States v. Dougherty, 473 F.2d 1113, 1130 (D.C. Cir. 1972).

5. Before reaching the issue of nullification, a right to a jury trial must exist. The Constitution excludes members of the "land and naval forces" from the right to indictment by grand jury and trial by petite jury for capital and infamous crime. *See* CONST. amends. V, VI. A service member's right to a trial by a panel of military members is established by a federal statute based on the exercise of Congress's power under Article I, § 8, Clause 14 of the Constitution. *See* UCMJ arts. 16, 51-52 (2000). Rule for Courts-Martial 805(b) expresses this right, stating that "[u]nless trial is by a military judge alone . . . no court-martial proceeding may take place in the absence of any detailed member except as specified in the rule." MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 805(b) (2002) [hereinafter MCM]. This creates a system in which military accuseds have the right to choose the common-sense judgment of a panel over the more trained, but possibly less sympathetic, legal judgment of a single military judge. In fact, if an accused fails to elect whether to be tried before a panel or a military judge, he is presumed to want a panel composed of officers to judge his fate. *See id.* Under the Uniform Code of Military Justice (UCMJ), if one-third or more of the panel members vote for a finding of not guilty of an offense, the accused is acquitted of that offense—regardless of the evidence, the law, or any jury instructions. *See* UCMJ art. 52(a)(2). While the Constitution protects a civilian criminal defendant from double jeopardy (or retrial) for an offense, the military accused enjoys the same protection under Article 44, UCMJ. *Compare* CONST. amend. V, *with* UCMJ art. 44. Finally, similar to their civilian counterparts on juries, members on court-martial panels may not be punished for the verdicts they render. *See* UCMJ art. 37; United States v. Hardy, 46 M.J. 67, 73 (1997).

6. *See, e.g.*, Major Michael R. Smythers, *Equitable Acquittals: Prediction and Preparation Prevent Post-Panel Predicaments*, ARMY LAW., Apr. 1986, at 3. In *Equitable Acquittals*, Major Smythers, then a military judge stationed in Nuernberg, Germany, described four factual case scenarios that resulted in "equitable acquittals;" that is, in jury nullification. *See id.*; *see also infra* app. A-B (two factual case scenarios that resulted in jury nullification in findings and sentencing, respectively).

his unit, the commander wants to "up the ante" to jail time and a federal criminal conviction.

At trial, the panel members learn that the accused has served honorably for nineteen years. She earned combat parachutist wings in Panama, and she fought bravely in the deserts of Iraq. In the last four years, she has had seven miscarriages. Military doctors believe these miscarriages might be symptoms of "Gulf War Syndrome" related to her service in Operations Desert Shield and Desert Storm. The accused testifies that she loves being a soldier, but believes the anthrax program is dangerous and may hurt her ability to conceive a child. Through tears, she says she would rather face the humiliation of a court-martial for disobeying an order than take an anthrax shot.

The military judge instructs the members that they each have the responsibility to "impartially resolve the ultimate issue as to whether the accused is guilty or not guilty in accordance with law, the evidence admitted in court, and [their] own conscience."[7] After deliberating for nearly three hours, the members return to the courtroom and ask, "If we find that all the elements of disobeying an order are present, does that necessarily mean that we still have to find the accused guilty as charged?"[8] How should the judge answer?

Similarly, imagine a case in which a soldier is charged with rape, oral sodomy, and adultery. The accused and the self-proclaimed victim ended their date at the accused's quarters with late-night drinks and sexual activity. The complaining witness testifies that she consented to oral sex, but then said "no" to any other sexual activity. The accused testifies that although he is technically married, he and his wife are legally separated. He describes the sexual activity in question in detail, focusing on the complaining witness's willing participation. The accused steadfastly maintains that both the oral and vaginal sex were consensual.

During closing argument, the defense counsel says the evidence clearly proves that no rape occurred. The defense argues that, under the circumstances, the accused should be found innocent of the rape charge

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7. *See* U.S. DEP'T OF ARMY, PAM. 27-9, LEGAL SERVICES: MILITARY JUDGES' BENCHBOOK 53 (1 Apr. 2001) [hereinafter BENCHBOOK].

8. *See, e.g.*, *Hardy*, 46 M.J. at 68. In *Hardy*, a panel returned from deliberations to ask: "If we find that both—that all the elements of the charge are present, that does not necessarily mean that we still have to find the defendant guilty of that charge, is that correct?" *Id.*

and, in addition, not guilty of the adultery and sodomy charges.[9] The trial counsel objects, asserting that "because the accused admitted to committing adultery and oral sodomy, the military judge should instruct the members that the government has proven each and every element beyond a reasonable doubt, and therefore the panel must find the accused guilty." The defense requests an instruction telling the members that "even if the prosecution met its burden of proof, no member may be forced to convict against his or her own good conscience." What should the military judge do?

In most criminal jurisdictions, including the military, the bench and bar remain silent about the jury members' power to nullify the law.[10] The Court of Appeals for the Armed Forces (CAAF) directly addressed the issue of jury nullification for the first time in *United States v. Hardy.*[11] In *Hardy*, counsel requested instructions at trial similar to those requested in the latter scenario above. The CAAF held that the military judge properly refused the trial counsel's request to direct the panel to return a verdict of guilty. The CAAF also stated, however, that no right of jury nullification exists; it held that the military judge did not err in declining to give a nullification instruction requested by the defense.[12] Although the CAAF answered whether military judges are required to give a jury nullification instruction, the court left unanswered the proper content of such instructions, if trial judges elect to give them. The CAAF also left unanswered whether counsel can argue for jury nullification.

The CAAF's reasoning and holding in *Hardy* reflect the overwhelming majority of jurisdictions that distinguish between the jury's duty to adhere to judicial instructions and its raw power to acquit in the face of those instructions.[13] This article offers an alternative solution: candor from the bench and bar. After reviewing the history and competing policies behind the concept of jury nullification, this article advocates allowing military counsel to argue the concept directly to the panel. When trial judges prohibit explicit argument, they simply drive arguments for nullification "underground." Faced with this situation, counsel can, do, and, in appropriate cases, should make veiled arguments to communicate jury nullification concepts to the members. This underground method of advocat-

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9. *See, e.g.*, *infra* app. A (a recent court-martial with similar facts that resulted in a full acquittal).

10. *See, e.g.*, *Hardy*, 46 M.J. at 67.

11. *Id.* at 75.

12. *Id.*

13. *See, e.g.*, United States v. Dougherty, 473 F.2d 1113, 1132 (D.C. Cir. 1972).

ing nullification, however, leads to an unpredictable administration of justice.

An alternative to court-imposed silence is to permit counsel to argue for nullification overtly and trigger a tightly worded, legally restrictive pattern nullification instruction. This honest, candid approach is a better way to address the tension between panel members' unreviewable power to acquit and their duty to follow instructions from the bench.[14] This article concludes that the integrity of the justice system demands nothing less than complete frankness and candor from the bench and bar.

II. The History and Policies Behind Jury Nullification

Courts in England and the United States have wrestled with the concept of jury nullification for hundreds of years. The official reports are sporadic, with courts and lawmakers attempting a variety of approaches to resolve the tension between jury power and judicial authority. This distinction between the jury's raw power to acquit and its duty to follow the instructions of the trial judge is the basis for the current state of American law.[15]

Criminal trials by jury began in England around the year 1200 A.D.[16] In these trials, judges retained great power over the jurors. Even after the jurors announced their decision, the judge could force them to reconsider an "incorrect" verdict.[17] If the jury failed to follow judicial instructions, the trial judge could fine the members or bring them before a Star Chamber for violating their oaths as jurors.[18]

The first well-known jury nullification occurred at an English trial in 1649.[19] Mr. John Lilburne, who opposed the rule of Oliver Cromwell, published pamphlets critical of the English government.[20] English authorities prosecuted Mr. Lilburne for high treason, which then included the offense of expression of an opinion critical of the government.[21] Mr. Lilburne did not deny that his pamphlets and opinions were critical of the government; rather, he argued that the statute prohibiting his conduct was

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14. *See* Horning v. District of Columbia, 254 U.S. 135, 138 (1920).

15. *See Dougherty*, 473 F.2d at 1132.

16. *See* P.G. Lawson, *Lawless Juries? The Composition and Behavior of Hertfordshire Juries, 1573-1624*, *in* TWELVE GOOD MEN AND TRUE: THE CRIMINAL TRIAL JURY IN ENGLAND 1200-1800, at 137 (J.S. Cockburn & Thomas A. Green eds., 1988).

17. *Id.*

unlawful. During summation, he boldly argued that an English jury had the right to judge the law itself.[22] Although no basis in law supported Mr. Lilburne's argument, the jury nevertheless acquitted him.[23]

In another English trial twenty-one years later, *Bushel's Case*,[24] Chief Justice Vaughan announced the principle of non-coercion of jurors. Justice Vaughan based this principal on his holding that judges may not punish or threaten to punish jurors for their verdicts.[25] Vaughan's landmark opinion concluded a series of cases surrounding the prosecution of William Penn and William Mead for unlawful assembly and disturbing the peace.[26] After authorities closed their London meeting house, Penn and Mead assembled with their Quaker congregation to preach and pray on the street. Admitting these facts, but maintaining his innocence, Mr. Penn argued, "The question is not whether I am guilty of the indictment, but whether this indictment be legal."[27]

Edward Bushel was a juror in this trial. He and his fellow jurors returned a verdict of not guilty. The angry trial judge fined Bushel and the other jury members for failing to fulfill their duty as jurors. Bushel and three others refused to pay the fine and were jailed. They remained in jail for more than two months, and they petitioned the Court of Common Pleas for a writ of habeas corpus. Chief Justice Vaughan released the prisoners, holding that judges may not fine or imprison jurors for their verdicts.[28]

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18. *Id.* at 137-38. The Star Chamber was

> an ancient court of England that received its name because the ceiling was covered with stars; it sat with no jury and could administer any penalty but death. The Star Chamber was abolished when its jurisdiction was expanded to such an extent that it became too onerous for the people of England . . . . The abuses of the star chamber [sic] were a principle reason for the incorporation in the federal constitution of the privilege against self-incrimination.

STEVEN H. GIFTS, LAW DICTIONARY 451 (Barron's 1984) (internal citations omitted).

19. *See* THOMAS A. GREEN, VERDICT ACCORDING TO CONSCIENCE: PERSPECTIVES ON THE ENGLISH CRIMINAL TRIAL JURY 1200-1800, at 153 (1985).

20. *Id.* at 168.

21. *Id.* at 170.

22. *Id.* at 173 (stating "the jury by law are not only judges of fact, but of law also").

23. *Id.* at 175.

24. 124 Eng. Rep. 1006 (C.P. 1670).

25. *Id.* at 1012-13.

26. *See* GREEN, *supra* note 19, at 200.

27. *Id.*

After *Bushel's Case*, English jurors could exercise their power to ignore judges' instructions to follow the law without fear of punishment.

Jurors in colonial America, as subjects of the Crown, also enjoyed the protection of the principle of non-coercion of jurors announced in *Bushel's Case*. These colonial jurists played a central role in opposing tyrannical English rule in the period leading up to American independence. They did so, in part, by commonly refusing to convict their fellow Americans, accused by English authorities, of smuggling and seditious libel.[29] The power of American juries to nullify the law went beyond their English cousins, extending to their right to decide questions of law.[30] As such, American counsel had the right to argue their personal interpretations of the validity of the law directly to the jury.[31]

One of the most famous of these trials occurred in 1735, when Andrew Hamilton defended John Peter Zenger against the charge of seditious libel. Hamilton argued that his client was innocent because the pamphlets Zenger published critical of the Royal Governor of New York were true. The judge properly instructed the jury that truth was not a recognized defense to seditious libel.[32] Although the judge prevented Hamilton from introducing evidence supporting the truth of the offending newspaper articles, he did allow nullification argument to the jury. Mr. Hamilton, citing *Bushel's Case* and the acquittals of William Penn and William Mead, argued that "it is very plain that the jury are by law at liberty . . . to find both the law and the fact in our case."[33] Despite the judge's instruction to the contrary, the jury accepted Mr. Hamilton's argument and found Mr. Zenger not guilty.[34]

During this period, the fear of jury nullification acted as a brake on statutes that empowered English customs inspectors to inspect American cargo ships. For example, in 1768, John Hancock refused to allow inspec-

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28. *Id.*

29. *See* Albert W. Alschuler & Andrew G. Deiss, *A Brief History of the Criminal Jury in the United States*, 61 U. CHI. L. REV. 867, 874 (1994).

30. *Id. But see* Stanton D. Krauss, *An Inquiry into the Right of Criminal Juries to Determine the Law in Colonial America*, 89 J. CRIM. L. & CRIM. 111 (1998) (stating that whether colonial juries had the right to determine the law and facts in criminal cases is unknown).

31. Alschuler & Deiss, *supra* note 29, at 874.

32. JAMES ALEXANDER, A BRIEF NARRATIVE OF THE CASE AND TRIAL OF JOHN PETER ZENGER, PRINTER OF THE NEW YORK WEEKLY JOURNAL 71 (Stanley Katz ed., 2d ed. 1972).

33. *Id.* at 92.

34. *Id.*

tors aboard his cargo ship, the *Lydia*. The attorney general refused to prosecute the case because he felt that no colonial jury would indict or convict Hancock.[35]

The threat of jury nullification during this time also led to changes in the mandatory application of the death penalty. According to Professor Lawrence M. Friedman, "Capital punishment was ineffective because it was not, and could not be, consistently applied. Its deadly severity distorted the working of criminal justice. A jury, trapped between two distasteful choices, death or acquittal, often acquitted the guilty."[36] To bring the system back into alignment, government authorities had no choice but to eliminate unduly harsh punishments. By 1800, state legislatures began abolishing or restricting the death penalty to cases of murder or treason. [37] At the end of the 19th century, Congress followed suit by replacing mandatory death sentences with discretionary jury sentencing. The Supreme Court noted in *Andres v. United States*[38] that Congress's decision was prompted by "[d]issatisfaction over the harshness and antiquity of the federal criminal laws."[39] In his concurring opinion, Justice Frankfurter observed that the movement leading to the legislation providing for discretionary sentencing in capital cases "was impelled both by ethical and humanitarian arguments against capital punishment, as well as by the practical consideration that jurors were reluctant to bring in verdicts which inevitably called for its infliction."[40]

In 1828, petty juries in America "consist[ed] usually of twelve men, [whose role was to] attend courts to try matters of fact in civil causes, and to decide *both the law and the fact* in criminal prosecutions. The decision of a petty jury [was] called a verdict."[41] As the United States grew and industrialized, however, the right to pass judgment on the law began to shift from lay jurors to legally trained judges, and "the jury's right to

35. JEFFREY ABRAMSON, WE, THE JURY: THE JURY SYSTEM AND THE IDEAL OF DEMOCRACY 24 (1994).

36. LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 283 (2d ed. 1985).

37. *Id.*

38. 333 U.S. 740 (1948).

39. *Id.* at 748 n.11.

40. *Id.* at 753 (Frankfurter, J., concurring). In a similar vein, the military justice system struggled with the issue of mandatory minimum life sentences. *See generally* United States v. Jefferson, 22 M.J. 315 (C.M.A. 1986) (ruling that to impress the members with the seriousness of the case, military judges must allow defense counsel to inform panel members about mandatory minimum life sentences during the findings portion of trial).

41. NOAH WEBSTER, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (1st ed. 1828) (emphasis added).

decide questions of law . . . was lost."[42] In 1835, Justice Story, then a judge in the Commonwealth of Massachusetts, made a crucial legal ruling when he stated flatly that the jury's function lay in accepting the law given to it by the court and applying the law to the facts.[43] Christopher Columbus Langdell, who became the Dean of the Harvard Law School in 1870, believed that law was a process of adjudication by logical reasoning that called for rigorous formal training. In his view, law was distinct from politics, legislation, and the opinion of laymen. As such, his teaching reflected his belief that the task of finding the correct rule to apply to a given case was beyond the ability and training of ordinary jurors.[44]

In 1895, the Supreme Court followed the trend established by Justice Story and Dean Langdell when it decided *Sparf v. United States*.[45] Sparf and Hansen were crewmen on the *Hesper.* They were accused of killing their second mate on the high seas and throwing his body overboard. Sparf and Hansen were tried, found guilty of murder, and sentenced to death. In affirming the trial judge's refusal to instruct the jury to consider the lesser offenses of manslaughter, attempted murder, and attempted manslaughter, the Court stated:

> The general question as to the duty of the jury to receive the law from the court, is not concluded by any direct decision of this court. But it has been often considered by other courts and by judges of high authority, and, where its determination has not been controlled by specific constitutional or statutory provisions expressly empowering the jury to determine both law and facts, the principle by which courts and juries are to be guided in the exercise of their respective functions has become firmly established.[46]

Twenty-five years later, in *Horning v. District of Columbia*,[47] the Supreme Court reviewed a pawnbroker's conviction for illegally operating a shop in Washington, D.C. At the trial judge's urging, the jury convicted the pawnbroker, despite the fact that the pawnbroker received all applications for loans and made all examinations of pledges at his Virginia office.

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42. Note, *The Changing Role of the Jury in the Nineteenth Century*, 74 YALE L.J. 170, 170 (1964).

43. United States v. Battiste, 2 Sum. 240 (C.C.D. Mass. 1835).

44. FRIEDMAN, *supra* note 36, at 612-18.

45. 156 U.S. 51 (1895).

46. *Id.* at 64.

47. 254 U.S. 135 (1920).

The Court held that the trial judge did not commit reversible error by telling the jury, in effect, to find the defendant guilty because the facts were undisputed and the jury was allowed the *technical right* to decide against the law and the facts.[48] Although the Court upheld the trial judge's instructions, the language from the majority and minority opinions validated the jury's power to acquit.

Justice Holmes, writing for the majority in *Horning*, stated, "The judge cannot direct a verdict it is true, and the jury has the power to bring in a verdict in the teeth of both law and facts."[49] Justice Brandeis, in dissent, added:

> Since *Sparf v. United States*, it is settled that, even in criminal cases, it is the duty of the jury to apply the law given them by the presiding judge to the facts which they find. But it is still the rule of the federal courts that the jury in criminal cases renders a general verdict on the law and the facts; and that the judge is without power to direct a verdict of guilty although no fact is in dispute.[50]

To this day, the issue of jury nullification remains in motion between the Supreme Court's holdings in *Sparf* and *Horning*. Jury members have a judge-made legal duty to follow instructions of law from the bench, but also retain the power to "bring in a verdict in the teeth of both law and facts."[51]

Protests against the Vietnam War during the 1960s revitalized interest in the jury's power, as the conscience of the community, to pass judgment on the law. In *United States v. Dougherty*,[52] the defendants admitted to breaking into and vandalizing a Dow Chemical Company office. They did this to protest the firm's manufacture of napalm bombs for use in Vietnam. Pleading not guilty, the defendants raised a defense of "sincere religious motives" or a belief in "some higher law."[53] The trial court refused a

48. *Id.* at 138 (emphasis added).
49. *Id.*
50. *Id.* at 139 (Brandeis, J., dissenting) (citations omitted).
51. *Id.* at 138.
52. United States v. Dougherty, 473 F.2d 1113 (D.C. Cir. 1972).
53. *Id.* at 1140 (Bazelon, C.J., dissenting).

defense request for a jury nullification instruction, and the defendants were convicted.[54]

The D.C. Court of Appeals upheld the convictions, noting that "[t]he existence of an unreviewable and unreversible power in the jury, to acquit in disregard of the instructions on the law given by the trial judge, has for many years co-existed with legal practice and precedent upholding instructions to the jury that they are required to follow the instructions of the court on all matters of law."[55] In affirming the trial judge's refusal to give the requested jury nullification instruction, the court observed, "The jury system has worked out reasonably well overall, providing 'play in the joints' that imparts flexibility and avoids undue rigidity. An equilibrium has evolved—an often marvelous balance—with the jury acting as a 'safety valve' for exceptional cases, without being a wildcat or runaway institution."[56] In dissent, Chief Judge Bazelon explained that the nullification power is a "necessary counter to case-hardened judges and arbitrary prosecutors."[57] The Chief Judge felt there was no justification for, and considerable harm in, the trial judge's lack of candor in denying a requested instruction on nullification and barring the defense counsel from raising the issue in argument before the jury.[58]

In 1997, the California Court of Appeal, Second District, reviewed *People v. Sanchez*,[59] in which the jury asked during deliberations if it could find a participant in a robbery, who did not directly participate in a killing, guilty of second-degree murder and robbery, rather than first-degree murder. The trial judge explained that the defendant was not charged with robbery and re-explained the concept of felony-murder, which California law classifies as first-degree murder and carries a mandatory life sentence. The judge then threatened to remove jurors who could not follow his instructions. The jury convicted the accused of first-degree murder.[60]

On appeal, the majority held that the trial judge may instruct jurors that the law does not leave open the possibility of a lesser offense. The court also held that the judge does not need to instruct jurors on their power of nullification. Finally, it ruled that judges may tell jurors they will be

54. *Id.* at 1117.
55. *Id.* at 1132.
56. *Id.* at 1134.
57. *Id.* at 1140 (Bazelon, C.J., dissenting).
58. *Id.*
59. 58 Cal. App. 4th 1435 (Cal. App. 2d 1997).
60. *Id.* at 1438.

removed if they cannot follow the law.[61] The dissent argued that jurors do have the power to nullify, and that any instruction indicating otherwise is erroneous and should not be given.[62]

In *United States v. Thomas*,[63] a federal judge went one step further than the facts of *Sanchez* by dismissing a juror during deliberations. In *Thomas*, five black defendants were accused of drug offenses. On the third day of deliberations, the jury informed the judge that it could not reach a verdict because Juror Number Five had a "predisposed disposition" to acquit "his people."[64] The judge interviewed the jurors individually and found that Juror Number Five was purposefully disregarding the court's instructions on the law and intended to vote for an acquittal, regardless of the evidence. After making this finding, the judge dismissed Juror Number Five from the trial. The remaining jurors then convicted the five defendants.[65]

The Court of Appeals for the Second Circuit stated that the district court judge's removal of a juror could be correct, but vacated the defendants' convictions. The court found that the trial judge "dismissed Juror [Number Five] largely on the ground that the juror was acting in purposeful disregard of the court's instructions on the law, when the record evidence raises a possibility that the juror was simply unpersuaded by the Government's case against the defendants."[66]

Before hearing *United States v. Hardy*, the military's highest court had not ruled directly on the issue of whether a court-martial panel should be instructed about its power to disregard instructions from the bench;[67] however, the predecessor to the CAAF, the Court of Military Appeals (COMA), had touched on the general topic of jury nullification, in dicta of four cases.

In *United States v. Mead*,[68] a judicial notice case, the COMA observed that although "civilian juries and court-martial members always have had the power to disregard instructions on matters of law given them by the

61. *Id.* at 1443-47.
62. *Id.* at 1452 (Johnson, J., dissenting).
63. 116 F.3d 606 (2d Cir. 1997).
64. *Id.* at 624.
65. *Id.* at 612.
66. *Id.* at 624.
67. *See* United States v. Hardy, 46 M.J. 67, 69-70 (1997).
68. 16 M.J. 270 (C.M.A. 1983).

judge, generally it has been held that they need not be advised as to this power, even upon request by a defendant."[69] In *United States v. Jefferson*,[70] the COMA reviewed a case in which the trial judge told the defense to refrain from informing the members during closing argument on findings that the mandatory minimum sentence for the offense in question was confinement for life.[71] In *Jefferson*, the COMA held that military judges must allow defense counsel to inform the panel about mandatory minimum life sentences to stress the seriousness of the case.[72]

In *United States v. Smith*,[73] the COMA held that the military judge's refusal to allow the defense to question prospective court members about their views on mandatory life sentences during voir dire did not provide a basis for overturning a premeditated murder conviction.[74] The court stated that jury nullification would have been an unacceptable basis for voir dire questions.[75] Finally, in *United States v. Schroeder*,[76] the COMA held that when the Uniform Code of Military Justice (UCMJ) provides for a mandatory minimum sentence, any sentence not conforming to mandatory minimums would be subject to reconsideration or rehearing.[77] Since deciding *Hardy* in 1997, the CAAF has not revisited the controversial issue of jury nullification.

United States v. Hardy[78] was a contested general court-martial at Fort Hood, Texas. An officer and enlisted panel convicted Specialist (SPC)

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69. *Id.* at 275.

70. 22 M.J. 315 (C.M.A. 1986).

71. *Id.* at 318.

72. *Id.* at 329.

73. 27 M.J. 25 (C.M.A. 1988).

74. *Id.* at 28-29 (limited to cases involving a mandatory minimum sentence, and arguably not applicable when the panel must use independent judgment to adjudge a sentence that best meets the needs of the soldier, the military service and society).

75. *Id.*

76. 27 M.J. 87 (C.M.A. 1988).

77. *Id.* at 90 n.1. This opinion, however, is not applicable to most offenses in which the panel may sentence the accused to no punishment. In this latter scenario, does little or no punishment constitute *jury nullification*? Strictly speaking, no. *But see* Interview by Major Walter Hudson with Senior Judge Robinson O. Everett, Court of Appeals for the Armed Forces, at Duke University Law School (Feb. 20-21, 2000) [hereinafter Everett Interview], *quoted in* Major Walter Hudson, *Senior Judges Look Back & Look Ahead*, 165 MIL. L. REV. 89 (2000). In discussing whether the military should do away with panel member sentencing in favor of judges imposing more predictable punishments, Judge Everett said, "I'm inclined to leave it as it is. I think probably the more unusual sentences by courts-martial are those that are too light, almost [a] type of *jury nullification*." *Id.* (emphasis added).

Hardy of forcible oral sodomy, but acquitted him of rape and attempted forcible anal sodomy. All charges grew out of a single incident. The panel sentenced SPC Hardy to a dishonorable discharge, confinement for five years, total forfeitures, and reduction to the lowest enlisted grade. The convening authority approved these results, and the Army Court of Criminal Appeals affirmed without a written opinion. When the case reached the CAAF, the court focused squarely on the issue of instructions.[79]

At SPC Hardy's trial, the military judge instructed on the issues of consent, intoxication of the victim (as it might have affected her ability to consent), mistake of fact (as to the victim's consent), and the appellant's voluntary intoxication. The military judge also instructed the members that they had the responsibility to "impartially resolve the ultimate issue as to whether the accused is guilty or not guilty in accordance with law, the evidence admitted in court, and [their] own conscience."[80] After deliberating for just under three hours, the members returned to the courtroom and asked, "If we find . . . all the elements of the charge are present, that does not necessarily mean that we still have to find the defendant guilty of that charge, is that correct?"[81] The military judge responded by telling the panel to consider "all the instructions" previously given on the elements of the offense and applicable defenses, and discussed an example involving the mistake of fact defense.[82]

After addressing the panel's question, the military judge held an Article 39(a), UCMJ, session to discuss the instructions he had given.[83] During this session, the trial counsel asked the military judge to provide the following instruction to the members: "If the government has proven each and every element beyond a reasonable doubt, and if there's no defense to that (sic), then they must find the individual guilty."[84] The military judge

78. 46 M.J. 67 (1997). For another synopsis of *United States v. Hardy*, see Donna M. Wright & Lawrence M. Cuculic, *Annual Review of Developments in Instructions–1997*, ARMY LAW., July 1998, at 47-50.

79. *Hardy*, 46 M.J. at 68.

80. *Id.*

81. *Id.*

82. *Id.*

83. *Id.* Article 39(a), UCMJ, provides statutory authority for the military judge to "call the court into session without the presence of the members." UCMJ art. 39(a) (2000).

84. *Hardy*, 46 M.J. at 68.

responded, "Well, I think that's pretty much what I said. How would you want me to say it differently?"[85]

After the judge declined the trial counsel's request to direct the panel to return a verdict of guilty, SPC Hardy's civilian defense counsel asked for an instruction that the members, "in their exercise of their peer discretion, . . . they may find him not guilty, notwithstanding findings that there is evidence beyond a reasonable doubt to sustain each and every element of the offense, and finding expressly that there are no affirmative defenses." [86] The trial judge declined this request stating, "Well, I disagree with you completely on that."[87]

On appeal, the CAAF reasoned that the military judge's response to the trial counsel's request expressed only general agreement and was not adopting it verbatim. The court pointed out that the actual instruction given to the members was "If, on whole evidence, you're satisfied beyond a reasonable doubt of the truth of each and every element, you *should* find the accused guilty."[88] The CAAF observed that neither the military judge's instructions before findings, nor his response to the members' subsequent questions stated that the members *must* return a finding of guilty. Commenting on the instructions given to the panel in *Hardy*, the CAAF stated that the correct instruction is that the panel *should* find the accused guilty when all of the elements had been proven and the defenses had been rebutted.[89]

In analyzing whether the trial judge erred by refusing to give a jury nullification instruction, the CAAF noted that the power of nullification does exist.[90] The court then considered the source of the power; that is, whether the power exists because the panel has the right to disregard the law, or as a collateral consequence of other policies, such as the requirement of a general verdict,[91] the absence of a directed guilty verdict,[92] the

85. *Id.*
86. *Id.* at 69.
87. *Id.*
88. *Id.* at 69 n.5. *See also* BENCHBOOK, *supra* note 7, at 53 n.1.
89. *Hardy*, 46 M.J. at 69 n.5.
90. *Id.* at 69.
91. *See* UCMJ art. 52 (2000) (setting the number of votes required for conviction).
92. *See id*. art. 37 (prohibiting any person subject to the UCMJ from attempting to coerce or influence a court-martial in reaching findings).

ban on double jeopardy,[93] and rules that protect the deliberative process of a court-martial.[94]

After discussing the origins of the power to nullify, the court turned its attention to the reasons why the power exists. In doing so, the CAAF reviewed federal case law and examined the arguments for and against jury nullification. In *United States v. Krzyske*,[95] the Court of Appeals for the Sixth Circuit rejected the idea that juries should be instructed on the power of jury nullification at the request of the defense. In *Krzyske*, a tax evasion case, the trial judge refused a defense request to instruct on jury nullification, but allowed the defense to use the term in argument. When the jury interrupted their deliberations to ask about the term, the judge instructed them that there was "no such thing as valid jury nullification."[96] Distinguishing between the jury's right to reach a verdict and the court's duty to instruct on the correct law, the *Krzyske* court recognized the power of jury nullification, but rejected the defense's contention that jurors must be advised of their power.[97]

Similarly, in *United States v. Moylan*,[98] the Court of Appeals for the Fourth Circuit also rejected the defense request for a jury nullification instruction. The *Moylan* court held that the power to nullify is inherent and the jury need not be further informed of a power that is obvious to them.[99]

After discussing *Krzyske* and *Moylan*, the CAAF then mentioned that the First, Seventh, Eighth, Ninth, Eleventh, and D.C. Circuits have also rejected the idea of explicit jury instructions on the jury's inherent power to nullify the law.[100] Quoting a law review article, the CAAF noted that

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93. *See id.* art. 44 (stating that no person, without his consent, may be tried a second time for the same offense).

94. *See, e.g.*, *id.* art. 51 (stating voting shall be by secret written ballot).

95. 836 F.2d 1013 (6th Cir. 1988).

96. *Id.* at 1020.

97. *Id.* at 1021.

98. 417 F.2d 1002 (4th Cir. 1969), *cert. denied*, 397 U.S. 910 (1970).

99. *Id.* at 1006.

100. United States v. Hardy, 46 M.J. 67, 71-72 (1997) (citing United States v. Anderson, 716 F.2d 446, 449-50 (7th Cir. 1983); United States v. Trujillo, 714 F.2d 102, 105-06 (11th Cir. 1983); United States v. Wiley, 503 F.2d 106, 107 (8th Cir. 1974); United States v. Simpson, 460 F.2d 515, 518-20 (9th Cir. 1972)); *see* United States v. Dougherty, 473 F.2d 1113, 1133 (D.C. Cir. 1972); United States v. Boardman, 419 F.2d 110, 116 (1st Cir. 1969), *cert. denied*, 397 U.S. 991 (1970).

only Maryland and Indiana recognize or encourage the power of jury nullification.[101]

The CAAF briefly acknowledged the argument that jury nullification is necessary to provide a check against overzealous prosecutors and to provide a way for the public in a democracy to register discontent with unpopular laws.[102] The CAAF stated that existing rules provide a means for limiting overzealous prosecutions, and therefore found the positive aspects of jury nullification did not require an instruction advising panel members about their power to nullify the law. Furthermore, the CAAF observed the dangers of over-emphasizing the jury's inherent power of jury nullification. The court reasoned that the jury that disregards the law could just as easily convict rather than acquit, and might render a decision based on fear, prejudice, or mistake. Dismissing the contention of some who insist that jury nullification exists to excuse crimes involving deeply held moral views, the CAAF pointed out that jury nullification could be exercised to excuse other conduct, such as sexual harassment, civil rights violations, and tax fraud.[103]

The CAAF then compared the military and civilian criminal justice systems. In both systems, the judge and jurors have distinct roles—the judge decides interlocutory questions of law, and the jurors decide questions of fact. Panel and jury deliberations are both privileged to a great extent. Neither military judges nor their civilian counterparts may direct a jury to return a guilty verdict; members or jurors return only with general verdicts. Military and civilian accused alike are protected by double jeopardy rules from a retrial, once they have been acquitted. The CAAF stated that despite the fact that civilian juries and military panels both have the power of jury nullification, such a right would be inappropriate for the military justice system because permitting panel members to disregard the law might lead them to ignore unpopular laws. The CAAF reasoned that free exercise of this right to nullify might violate the principle of civilian con-

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101. *Hardy*, 46 M.J. at 72 (quoting Lieutenant Commander Robert E. Korroch & Major Michael J. Davidson, *Jury Nullification: A Call for Justice or an Invitation to Anarchy?*, 139 MIL. L. REV. 131, 139 (1993)). However, Georgia also recognizes its jurors as the judges of both the law and the facts in a criminal case. *See* GA. CONST. art. I, § I, para. XI(a). In addition, South Dakota will vote on whether to amend the state constitution to allow jurors in criminal cases to judge the law as well as the facts. *See* Molly McDonough, *Jury Nullification on the Ballot*, Oct. 4, 2002, ABA J. REP., *at* http://www.abanet.org/journal/ereport/oct4jury.html.

102. *Hardy*, 46 M.J. at 72.

103. *Id.*

trol over the military. Unrestrained exercise of the panel's power to nullify the law might also countermand discipline and foster disrespect for the law.[104]

Concluding its opinion, the CAAF acknowledged a panel's inherent power to nullify the law, but held there is no right to jury nullification because the power to nullify exists due to the "collateral consequence of the rules concerning the requirement for a general verdict, the prohibition against double jeopardy, and the rules that protect the deliberative process of a court-martial panel."[105] It held, "[B]ecause there is no 'right' of jury nullification, the military judge in this case did not err either in declining to give a nullification instruction or in declining otherwise to instruct the members that they had the power to nullify his instructions on matters of law."[106]

Old Chief v. United States,[107] like *Hardy*, was decided in 1997. In *Old Chief*, the Supreme Court acknowledged the power of jury nullification. Old Chief was convicted of possession of a firearm by a person with a prior felony conviction. At trial, Old Chief offered to stipulate to his prior conviction, arguing that his offer made evidence of the name and nature of his prior offense inadmissible.[108] The prosecution refused to join the stipulation and insisted on its right to present its own evidence of the prior conviction. The Supreme Court held it was an abuse of discretion for the trial judge to admit the record of conviction when the defendant's stipulation was available. In a footnote, the Court explicitly discussed the impact of jury nullification on these types of cases:

> [A]n extremely old conviction for a relatively minor felony that nevertheless qualifies under the statute might strike many jurors as a foolish basis for convicting an otherwise upstanding member of the community of otherwise legal gun possession. Since the Government could not, of course, compel the defendant to admit formally the existence of the prior conviction, the Government would have to bear the risk of jury nullification, a fact that might properly drive the Government's charging decision.[109]

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104. *Id.*
105. *Id.*
106. *Id.*
107. 519 U.S. 172 (1997).
108. *Id.* at 175. Old Chief's prior felony conviction was for an assault causing serious bodily injury. *Id.*
109. *Id.* at 185 n.8.

The quotation from *Old Chief* illustrates that the United States' highest court recognizes that jury nullification may, in appropriate cases, play a powerful role in charging, trying, and deciding cases.[110]

Opinions differ over the future role of juries in criminal trials. Some, citing the acquittals of O.J. Simpson, Mayor Barry, and the police officers that beat Rodney King, want the role of the jury controlled tightly.[111] Others, citing the acquittal of Dr. Kevorkian, maintain that modern juries continue to serve a valuable role as the conscience of the community and the last refuge for protection against overreaching by the government.[112] More radical commentators even call for race-based jury nullification.[113]

Federal District Court Judge Jack Weinstein, discussing jury nullification instructions wrote, "Such an instruction is like telling children not to put beans in their noses. Most of them would not have thought of it had it not been suggested."[114] On the other hand, Judge Dann of Arizona, a leading proponent of jury reform, argued, "It is that power and control of the trial process, jealously guarded by many judges and lawyers, that harms the jury, a key democratic institution."[115] In this democratic spirit, the state constitutions of Indiana, Maryland, and Georgia protect the cen-

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110. *See also infra* apps. A and B (demonstrating the successful use of jury nullification themes in recent courts-martial).

111. *See* Douglas R. Litowitz, *Jury Nullification: Setting Reasonable Limits*, 11 CBA RECORD 16 (Sept. 1997).

112. *Id.* This argument, however, is by no means modern. In a 1789 letter to Thomas Paine, Thomas Jefferson wrote, "Another apprehension [about the French Revolution] is a majority cannot be induced to adopt the trial by jury; and I consider that as the only anchor ever yet imagined by man, by which a government can be held to the principles of its constitution." 7 WRITINGS OF THOMAS JEFFERSON 408 (Albert Ellery Bergh ed., 1907).

113. *See, e.g.*, Paul Butler, *Racially Based Jury Nullification*, 105 YALE L.J. 677, 696 (1995) (calling for the African-American community to use jury nullification to acquit nonviolent African-American lawbreakers).

114. Jack Weinstein, *Considering Jury Nullification: When, May and Should a Jury Reject the Law to Do Justice?*, 30 AMER. CRIM. L. REV. 239, 250 (1993).

115. Michael Dann, *"Learning Lessons" and "Speaking Rights": Creating Educated and Democratic Juries*, 68 INDIANA L.J. 1229 (1993) (speaking of juries generally, not jury nullification specifically).

tral role of juries by making them the finders of fact and law in criminal cases.[116]

Juries are unique. No other institution places so much power directly in the hands of such a small group of ordinary citizens. Jury nullification represents both the best and the worst of the jury system, as jurors struggle to deal justly with the liberty of their fellow citizens. The performance of juries in the post-Civil War era best illustrate this dichotomy. Faced with incredible power and responsibility, nineteenth century juries in the North chose to shelter fugitive slaves and the abolitionists.[117] In contrast, juries in the South chose to free vigilantes who lynched African-Americans[118] and to wrongly convict and sentence African-American defendants to death.[119]

Douglas Litowitz put his finger on the volatile nature of the nullification debate in his article, *Jury Nullification: Setting Reasonable Limits*.[120] He wrote:

> [The] distinction between principle and policy . . . is crucial because it explains why jury nullification strikes us as morally permissible in *Bushel's Case*, the Zenger case and the Fugitive Slave Cases, but not in the Simpson case . . . . Thinking about the problem in this way helps explain why most lawyers were not troubled by the Kevorkian acquittal, but were enraged by the O.J. Simpson verdict. The Kevorkian acquittal seemed consistent with the judgment of many lawyers that the Michigan statute [prohibiting physician-assisted suicide] unduly restricted a fundamental "right to die," a right based on Constitutional guarantees of liberty and privacy . . . . In contrast, the Simpson verdict did not affirm any fundamental rights—it seemed more akin to an act of revenge.[121]

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116. IND. CONST. art. I, § 19 ("In all criminal cases whatsoever, the jury shall have the right to determine the law and the facts."); MD. CONST. art. XXIII ("In the trial of all criminal cases, the Jury shall be the Judges of Law, as well as fact, except that the Court may pass upon the sufficiency of the evidence to sustain a conviction."); GA. CONST. art. I, § I, para. XI(a) ("The jurors are the judges of both the law and the facts in a criminal case.").

117. *See* ABRAMSON, *supra* note 35, at 80-82.

118. *Id.* at 61-63.

119. *See, e.g.*, DAN T. CARTER, SCOTTSBORO: A TRAGEDY OF THE AMERICAN SOUTH (1969) (a historical account of eight black youths falsely convicted and sentenced to die; the Supreme Court reversed the convictions on the ground of racial discrimination).

120. Litowitz, *supra* note 111.

121. *Id.* at 20-21.

Distinctions aside, the central issue remains how to best maintain a "marvelous balance, with the jury acting as a 'safety valve' for exceptional cases, without being a wildcat or runaway institution."[122]

III. Why So Little Case Law?

Given the controversial nature of jury nullification, the amount of case law on the subject is surprisingly small. The dearth of cases may give an inaccurate impression that jury nullification issues at trial are very rare. One reason for the limited case law, however, is that an acquittal does not result in a reported decision. For example, there are no official reported decisions of the criminal cases against John Lilburne, William Penn and William Mead, or John Peter Zenger. Likewise, no appellate records exist of more recent acquittals allegedly driven by jury nullification, including the trials of former Washington D.C. Mayor, Marion Barry;[123] football and film star, O.J. Simpson;[124] Iran-contra cohort, Lieutenant Colonel Oliver North;[125] or the champion of physician-assisted suicide, Dr. Jack Kevorkian.[126] Similarly, in cases in which a trial judge gives requested nullification instructions, and the outcome is a conviction, nullification will not be an issue on appeal. The "records" of nullification cases in which the defense prevails exist only in popular media and legal legend. Some of these are quite humorous,[127] but provide counsel with little value as precedent for arguing the finer points of the law in court.

The only reported decisions, therefore, are cases in which the judge refused to give the defense-requested instructions and the accused was convicted. This helps explain why the concept of jury nullification, which goes to the very core of the American jury system, appears to receive less attention from the legal community than it deserves. Mr. Timothy Lynch, an associate director of the Cato Institute's project on criminal justice, argued that this absence of pro-nullification case law places the defense bar

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122. United States v. Dougherty, 473 F.2d 1113, 1134 (D.C. Cir. 1972).

123. *See generally* Saundra Torry, *Court Hears Defense of Judge's Bans*, WASH. POST, July 4, 1990, at A2, A12 (successful defense appeal of trial judge's order to exclude Minister Louis Farrakhan and Reverend George Stallings from the trial gallery to prevent "impermissible message" of African-American support of Marion Barry's public plan to seek jury nullification).

124. *See* Butler, *supra* note 113, at 696.

125. *See* ABRAMSON, *supra* note 35, at 66-67.

126. *See* ALEXANDER, *supra* note 32, at 65.

at a distinct disadvantage because counsel do not have reported authority to cite when requesting jury nullification instructions from the bench.[128]

IV. Allowing Jury Nullification Argument

United States v. Hardy reaffirmed that military members have the raw power to nullify the law.[129] *Hardy* did not address, however, whether counsel may argue jury nullification to the panel.[130] Therefore, this issue

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127. Take, for example, this story about country juries:

> The classic story of a [country] jury [is about] a man who was on trial for stealing some heifers. When the jury returned with their verdict, the Associate said, "Do you find the accused guilty or not guilty of cattle stealing?" To which the foreman replied "Not guilty, if he returns the cows." The judge read the jury the riot act and concluded by saying, "Go out and reconsider your verdict. You swore that you would try the issue . . . and find a true verdict according to the evidence." The jury retired again, and when they returned they had a belligerent air about them. The associate said, "Have you decided on your verdict?" The foreman said, "Yes, we have. We find the accused not guilty—and he doesn't have to return the cows."

THE OXFORD BOOK OF LEGAL ANECDOTES 11-12 (Michael Gilbert ed., Oxford University Press 1989).

Another good example is the story about a Welsh jury:

> At the annual dinner of a Welsh Society in London, where he was the principal guest, Cassels declared that Judges had to be extremely careful when they were on circuit in Wales. He recalled the case of the judge who was asked by the defendant's counsel if he could say a few words in Welsh to the jury at the end of his closing speech. The judge, anxious that there should be no appearance of even a linguistic bias, agreed. The counsel spoke for only twenty seconds in Welsh, thanked the judge and sat down. The judge summed up and the weight of the evidence was dead against the prisoner but, without leaving the jury box, the jury found him not guilty. Back in his private room the judge puzzled for some minutes, then sent for a court attendant and asked him what the defense counsel had said. It was, "The prosecutor is English, the prosecution counsel is English, the judge is English. But the prisoner is Welsh, I'm Welsh, and you're Welsh. Do your duty."

Id. at 61.

128. Timothy Lynch, *Practice Pointer*, THE CHAMPION, Jan./Feb. 2000, at 32.

129. 46 M.J. 67 (1997).

remains an open question of law.[131] Should members be left to learn of their power through non-legal sources, such as books, Hollywood dramas, and the news media? Or, should counsel be allowed to echo the teachings of Alexander Hamilton,[132] John Adams,[133] or Thomas Jefferson[134] and argue jury nullification concepts directly to the members?

The only military case that comes close to addressing whether counsel may openly argue jury nullification to the panel members is *United States v. Jefferson*.[135] In *Jefferson*, the government argued that the mandatory minimum sentence for murder was irrelevant during arguments for findings. The COMA rebuked this argument, holding that the defense should have been permitted to impress the panel members with the seriousness of the accusations during the findings portion of the trial.[136] As such, the government must factor in the threat of jury nullification when making its charging decisions because military panels forced to choose between mandatory confinement for life or acquittal may feel compelled to acquit to avoid an unduly harsh punishment.[137]

Other jurisdictions have case law addressing the issue of arguing nullification. In *United States v. Krzyske*,[138] a tax evasion case, the trial judge refused a defense request to instruct on jury nullification, but allowed the

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130. *Hardy* centers on the military judge's failure to give a requested instruction. Therefore, the CAAF did not go beyond the issue of instructions. *See generally id.*

131. *See id.* at 67.

132. Alexander Hamilton noted that jury trials would prevent "[a]rbitrary impeachments, arbitrary methods of prosecuting offenses, and arbitrary punishments upon arbitrary convictions." THE FEDERALIST NO. 83, at 499 (Clinton Rossiter ed., 1961).

133. "It is not only [the juror's] right, but his duty . . . to find the verdict according to his own best understanding, judgment, and conscience, though in direct opposition to the direction of the court." 1 LEGAL PAPERS OF JOHN ADAMS 230 (L. Kinvin Wroth & Hiller B. Zobel eds., 1965).

134. In 1782 Mr. Jefferson explained,

> [I]t is usual for the jurors to decide the fact, and to refer the law arising on it to the decision of the judges. But this division of the subject lies with their discretion only. And if the question relates to any point of public liberty, or if it be one of those in which the judges may be suspected of bias, the jury undertake to decide both law and fact.

THOMAS JEFFERSON, NOTES ON THE STATE OF VIRGINIA 140 (J.W. Randolph ed., 1853).

135. 22 M.J. 315 (C.M.A. 1986).

136. *Id. But see* United States v. Smith, 27 M.J. 25, 29 (1988) (stating in dicta that jury nullification is an unacceptable basis for voir dire questions; Chief Judge Everett, however, noted in his concurring opinion that *Smith* does not overturn *Jefferson*).

defense to use the term in argument.[139] Similarly, in *New Hampshire v. Elvin Mayo, Jr.*,[140] the New Hampshire Supreme Court found that the trial court did not abuse its discretion in denying a defense request for a jury nullification instruction, in part because the trial judge allowed the defense counsel to argue jury nullification in closing arguments. In *Mayo*, the trial judge allowed counsel to argue to the jury,

> If you find that the prosecution has proven beyond a reasonable doubt each and every element, you may, or should, find [the defendant] guilty. You are not required to. You must find him not guilty if each and every element has not been proven; you may, or should, find him guilty if each and every element has been proven. You don't have to.[141]

Two other cases also on point, both from the Court of Appeals for the Eleventh Circuit, explicitly hold that defense counsel may not argue jury nullification. In *United States v. Trujillo*,[142] a drug trafficking case, the defense counsel wanted to argue that his client's cooperation with the authorities entitled him to a not guilty verdict. While recognizing that a jury may "render a verdict at odds with the evidence and the law," the Eleventh Circuit held that "neither the court nor counsel should encourage the jurors to violate their oath."[143]

In *United States v. Funches*,[144] Mr. Funches, a convicted felon, was charged with possessing a firearm.[145] He claimed that a government offi-

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137. *See, e.g.*, FRIEDMAN, *supra* note 36, at 283 (discussing nullification acting as a brake in death penalty cases). The recent trial of two brothers in Florida for killing their father clearly demonstrates this dynamic. A Florida jury found thirteen-year old Alex King and his fourteen-year old brother, Derek, guilty of second-degree murder without a weapon in the beating death of their father, Terry. In Florida, a conviction for first-degree murder carries a minimum sentence of life without parole. Because the jury ignored the evidence that Terry King's murderer wielded a bat, convicting the brothers of a lesser offense, the brothers face only twenty-two years to life without parole, and the judge may go below the minimum. Commenting on the verdict, the assistant state attorney who prosecuted the case said, "[The jurors] knew good and well [Terry King] was killed with a weapon. That's a jury pardon. That's okay, I don't have a problem with that." Bill Kaczor, *Murder Verdicts Stun Fla. Jurors, Prosecutor*, WASH. POST, Sept. 8, 2002, at A8.

138. 836 F.2d 1013 (6th Cir. 1988).

139. *Id.* at 1020.

140. 125 N.H. 200 (N.H. 1984).

141. *Id.* at 204.

142. 714 F.2d 102 (11th Cir. 1983).

143. *Id.* at 106.

144. 135 F.3d 1405 (1998), *cert. denied*, 524 U.S. 962 (1998).

cial told him that after he completed his sentence, his civil rights would be restored and he could possess a firearm. Funches claimed he relied in good faith on this government official's advice.[146] Funches appealed his conviction based on the fact that he was not allowed to testify or argue about his mistaken beliefs at trial. The appellate court noted, "Piercing through the form of Funches' arguments, it appears that his real contention is that he had a due process right to present evidence the only relevance of which is to inspire a jury to exercise its power of nullification."[147] Citing *Trujillo*, the court held, "No reversible error is committed when evidence otherwise inadmissible under Rule 402 of the Federal Rules of Evidence [relevance], is excluded, even if the evidence might have encouraged the jury to disregard the law and acquit the defendant."[148]

When military counsel argue findings, they may properly include reasonable comment on the evidence in the case, including inferences drawn in support of their theory of the case.[149] In doing so counsel may make reference to applicable law, but their references must be accurate.[150] They may not directly cite legal authority to panel members.[151] But, counsel routinely refer to instructions members will hear or have heard from the bench.

When confronted with improper arguments, military judges have four options: they can sua sponte stop the argument;[152] give a curative instruction;[153] order counsel to make a retraction;[154] or they can declare a mistrial.[155] If the military judge stops counsel during argument, the most

145. *Id.* at 1406 (allegedly violating 18 U.S.C. § 922(g)(1)).

146. *Id.* at 1407.

147. *Id.* at 1408.

148. *Id.* at 1409 (citing United States v. Trujillo, 714 F.2d 102, 105-06 (11th Cir. 1983)).

149. *See* MCM, *supra* note 5, R.C.M. 919(b).

150. *See* United States v. Turner, 38 M.J. 1183 (A.F.C.M.R. 1990).

151. *See* United States v. McCauley, 25 C.M.R. 327 (C.M.A. 1958).

152. *See, e.g.*, United States v. Grady, 15 M.J. 275 (C.M.A. 1983); United States v. Nelson, 1 M.J. 235 (C.M.A. 1975).

153. *See, e.g.*, United States v. Horn, 9 M.J. 429 (C.M.A. 1980); United States v. Carpenter, 29 C.M.R. 234 (C.M.A. 1960).

154. *See, e.g.*, United States v. Lackey, 25 C.M.R. 222 (C.M.A. 1958).

155. *See, e.g.*, United States v. McPhaul, 22 M.J. 808 (C.M.R. 1986), *cert. denied*, 23 M.J. 266 (C.M.A. 1986); United States v. O'Neill, 36 C.M.R. 189 (C.M.A. 1966).

likely result will be a short out-of-court session to discuss whether the argument was proper and whether a curative instruction is necessary.

Some would argue that jury nullification is not relevant to findings, and therefore defense counsel should be prohibited from arguing the concept. This article takes the position that the accused, the members, and the integrity of the military justice system deserve nothing less than unfettered candor about the jury's power to render a just verdict. Counsel should be allowed to comment on the members' power to determine not only the facts of the case, but also to render individualized justice—despite instructions to the contrary.

The military should decline to follow the lead of *Trujillo* and *Funches*. Instead of criticizing and ignoring the members' power to nullify the law, the best defense against misuse of jury nullification is the selection of a fair panel. One commentator argues that courts should work to reduce the likelihood of misuse of jury nullification through stronger *Batson*-type jury selection rules, better and more honest guidance concerning the jury's powers, and more liberal voir dire.[156] In addition, reports of sensational historical and modern cases fly in the face of the argument that the Republic will fall if attorneys are allowed to argue that a particular application of a law in a specific case is unjust. While it is true that nullification arguments were so successful in the Fugitive Slave Cases that in 1850 Congress drafted federal legislation to deny slaves the right to trial by jury,[157] history has shown that the courageous abolitionist counsel and jurors who effectively nullified pro-slavery laws were morally correct in doing so.

Clearly, under *Hardy*, there is no right to an instruction on jury nullification from the bench.[158] Court-martial panels give general findings,[159] however, and members may not be polled about their deliberations and voting.[160] Therefore, they continue to have the power to render an unreviewable decision that does not necessarily follow the military judge's instructions. Whether military defense counsel may openly argue for jury nullification remains an open question of law. When military judges

156. *See* Clay S. Conrad, *Scapegoating the Jury*, 7 CORNELL J.L. & PUB. POL'Y 7 (1997).

157. *See* ABRAMSON, *supra* note 35, at 80-82 (noting that in the Fugitive Slave Cases, attorneys from the North asked juries to acquit abolitionists prosecuted for helping slaves escape, and encouraged them to refuse to send runaway slaves back to the South).

158. *See* United States v. Hardy, 46 M.J. 67 (1997).

159. UCMJ art. 51 (2000) (member voting by secret written ballot).

160. MCM, *supra* note 5, R.C.M. 922(e).

choose to limit or prohibit argument, they may inadvertently drive nullification arguments underground. No commander would send his troops into battle before ensuring they know how to use *all* the weapons in their arsenal. Similarly, no military judge should send a panel into deliberations before accurately and fully informing them of *all* their powers under the law. Rather than prohibiting argument, military judges should allow argument, and then provide the members with definitive guidance on their role by giving them a tightly worded, legally restrictive pattern instruction on nullification.

V. The Unavoidable Issue of Veiled Jury Nullification Arguments

When military judges prohibit counsel from arguing jury nullification directly to the members, resourceful counsel can still communicate the power of nullification indirectly.[161] Counsel accomplish this by focusing on language in the member's oath and instructions[162] or by linking a nullification theme to a recognized legal defense.[163] For this reason, a military panel nullification instruction is necessary regardless of the permissibility of nullification argument.

A. Oath and Instructions

The panel members' oath includes a directive that the members decide the case according to their own conscience. Counsel can communicate a nullification theme by emphasizing this directive, arguing that each member's duty is to find the accused guilty or not guilty in accordance with the law, the evidence admitted in court, and *their own conscience*.[164] Counsel can also stress in argument the military justice system's expectation that the members use their own "common sense, knowledge of human nature and the ways of the world" in reaching a just verdict.[165] Moreover, the military judge instructs the panel that it *must* acquit if the prosecution fails to meet its burden of proof, but only *should*

161. See Appendix A of this article for an example of a jury nullification argument at a general court-martial that drew no objections from the prosecution or questions from the bench. At this court-martial, no jury nullification instructions were requested or given; no jury nullification evidence was admitted in the case-in-chief, outside of a good soldier defense and the accused's testimony; and the case ended with a complete acquittal of the accused. *See infra* app. A.

162. BENCHBOOK, *supra* note 7, at 36.

163. *See generally* MCM, *supra* note 5, R.C.M. 916 (listing defenses).

convict if the prosecution meets its burden. Finally, the members are told it is their responsibility alone to decide whether or not to convict.[166]

In addition to focusing on specific language contained in the member's oath and certain instructions, counsel can remind the members that they will meet in secret session and cast secret written ballots. The knowledge that their vote is secret may give individual members the confidence to cast their votes in a manner that rejects or refuses to apply the law.[167] The instructions the military judge gives the members before their deliberations on findings supports this type of argument.[168] Finally, counsel can vigorously argue to the members that one of the primary goals of the UCMJ is to achieve justice on a case-by-case basis, and that "some social issue . . . is larger than the case itself" or that the "result dictated by law is contrary to . . . justice, morality, or fairness."[169]

Clearly, jury nullification advocacy includes varying degrees of implicit and explicit approaches. For example, a defense counsel might try to reference explicitly greater societal goals and fundamental fairness. The defense counsel may be more effective, however, by arguing that each case is different, and that members must use their own independent judgment, conscience, and common sense in reaching a just verdict. Certainly, the latter approach is not objectionable, regardless of the emphasis placed upon the particular instructions.[170] In contrast, the former, explicit argu-

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164. *See* BENCHBOOK, *supra* note 7, at 36. The member's oath states:

> Do you swear or affirm that you will answer truthfully the questions concerning whether you should serve as a member of this court-martial; that you will faithfully and impartially try, according to the evidence, *your conscience*, and the laws applicable to trials by court-martial, the case of the accused now before this court; and that you will not disclose or discover the vote or opinion of any particular member of the court upon a challenge or upon the findings or sentence unless required to do so in the due course of law, so help you God?

Id. (emphasis added).

165. *Id.* at 52-53. The military judge advises the panel as follows:

> In weighing and evaluating the evidence *you are expected to utilize your own common sense, your knowledge of human nature and the ways of the world* . . . . The final determination as to weight or significance of the evidence and the credibility of the witnesses in this case rests solely upon you.

Id. (emphasis added).

ment might draw an objection from the trial counsel or from the military judge, reducing its effectiveness.

B. Linking Argument to Legal Defenses

Jury nullification is not recognized as a legal defense; however, "[t]he nullification doctrine derives from the same moral principles as the mens rea or responsibility defense."[171] Defense counsel may attempt to strengthen their call for jury nullification in a given case by linking their arguments to recognized legal defenses.[172] In other words, counsel can strive to give the panel members something to "hang their hats on" if they choose to acquit.

Jury nullification themes are embedded in compatible defenses such as justification, obedience to orders, self-defense, accident, entrapment, coercion or duress, inability, ignorance or mistake of fact, and lack of men-

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166. *See id.* at 53.

> You must disregard any comment or statement or expression made by me during the course of the trial that might seem to indicate any opinion on my part as to whether the accused is guilty or not guilty since *you alone have the responsibility to make that determination*. Each of you must impartially decide whether the accused is guilty or not guilty in accordance with the law I have given you, the evidence admitted in court, and *your own conscience.*

Id. (emphasis added). The instructions the military judge gives the members before counsel begin the presentation of their cases, however, includes language inconsistent with the idea that jury nullification is proper:

> Members of the court, it is appropriate that I give you some preliminary instructions. My duty is to ensure the trial is conducted a fair, orderly and impartial manner in accordance with the law. I preside over open sessions, rule upon objections, and instruct you on the law applicable to this case. *You are required to follow my instructions on the law* and may not consult any other source as to the law pertaining to this case unless it is admitted into evidence. This rule applies throughout the trial including closed sessions and periods of recess and adjournment. Any questions you have for me should be asked in open court. As court members, it is your duty to hear the evidence and determine whether the accused is guilty or not guilty and if you find (him) (her) guilty, to adjudge an appropriate sentence.

Id. at 36-37 (emphasis added).

tal responsibility.[173] For example, in *Hardy*, the trial judge instructed the

167. In *To Be a Trial Lawyer*, F. Lee Bailey effectively demonstrated how to stress jury deliberation secrecy and the finality of the jury's verdict during argument:

> You have probably noticed that throughout the trial, no one has uttered a sound except when our very able court reporter, Ms. Roberts here, has been seated at her stenograph. She has taken down literally every word that has been spoken by the court, the lawyers, the witnesses, and even the questions about schedule that you, Madam Foreperson, asked of the judge. But when you go into your jury room to deliberate this case, Ms. Roberts will not be going with you. None of what you say will be recorded. If you reach a verdict, we will learn only what that verdict is, not how you reached it. The law conclusively presumes that you remember all of the evidence that the record contains, that you have listened carefully to the arguments of counsel, that you heard and understood every word and every concept of the court's instructions on the law, and that you correctly applied that law to the facts you found to be true. The law so conclusively presumes all these things to be true that we are not even permitted to inquire into the process that led to the verdict . . . . [I]f you wrongly hang a conviction around Mr. Daniels neck, he must wear it like a yoke for the rest of his life.

F. LEE BAILEY, TO BE A TRIAL LAWYER 175-77 (2d ed. 1994).

168. BENCHBOOK, *supra* note 7, at 53.

> The following procedural rules will apply to your deliberations and must be observed: The influence of superiority of rank will not be employed in any manner in an attempt to control the independence of the members in *the exercise of their own personal judgment*. Your deliberations should include a full and free discussion of all the evidence that has been presented. After you have completed your discussion, then *voting on your findings must be accomplished by secret, written ballot*, and all members of the court are required to vote.

Id. (emphasis added).

169. BLACK'S LAW DICTIONARY 862 (7th ed. 1999) (defining jury nullification).

170. BENCHBOOK, *supra* note 7, at 53 (stating that if any inconsistency exists between instructions referred to by counsel in argument and those instructions given by the bench, the panel must accept the instructions from the military judge as correct).

171. United States v. Dougherty, 473 F.2d 1113, 1142 (D.C. Cir. 1972) (Bazelon, C.J., dissenting).

172. *See* MCM, *supra* note 5, R.C.M. 916 (providing a non-exclusive list of defenses recognized by the military justice system).

173. *See generally id.* Interestingly, the only two concepts the Rules for Courts-Martial expressly exclude as defenses are ignorance or mistake of law and voluntary intoxication. *See id*. R.C.M. 916(*l*). These concepts are both frequently presented during sentencing, however, as evidence of extenuating circumstances under the authority of RCM 1001(a)(1)(B).

members on consent, intoxication of the victim as it might have affected her ability to consent, mistake of fact as to the victim's consent, and the accused's voluntary intoxication. After deliberating for more than two hours, the panel itself raised the issue of jury nullification.[174]

Some offenses lend themselves better to jury nullification-type arguments than others. For example, Article 134 offenses include the element that the act or omission in question discredited the service or was prejudicial to good order and discipline, which must be proven to the members beyond a reasonable doubt.[175] Similarly, some defenses seem tailor-made for an equitable acquittal argument. For example, the good soldier defense standing alone may result in a not guilty verdict.[176] Because members are instructed that their votes must comport with their conscience, they clearly have great power and discretion to return a just verdict.

Of course, argument is not the only opportunity for counsel to bring the concept of jury nullification to the panel's attention. If counsel intend to argue for jury nullification, they should weave nullification concepts into their case during voir dire, opening statement, witness examination, and by raising certain defenses, such as the good soldier defense or lack of mens rea.

The discussion following Rule for Courts-Martial (RCM) 912 states, "The opportunity for voir dire should be used to obtain information for the intelligent exercise of challenges; counsel should not purposely use voir dire to present factual matter which will not be admissible or to argue the case."[177] Because "intelligent" exercise of challenges may not be made in a vacuum, counsel may have room to weave jury nullification-type themes into thoughtful and legitimate voir dire questions. Counsel could stress the

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174. United States v. Hardy, 46 M.J. 67, 68 (1997).

175. UCMJ art. 134 (2000). Some would argue that an acquittal of an Article 134 offense never amounts to jury nullification because the offense includes the element "discredited the service or was prejudicial to good order and discipline." *Id.* According to this argument, when an accused is acquitted of an Article 134 offense, the members merely found that the government did not prove the "discredit/prejudice" element, rather than chose not to enforce the statute. See Appendix A of this article, however, for an example of a panel finding an accused not guilty of both Article 134 and enumerated offenses the accused admitted to committing.

176. *See, e.g.*, Randall D. Katz & Lawrence D. Sloan, *In Defense of the Good Soldier Defense*, 170 MIL. L. REV. 117, 119 (2001) ("although the good soldier defense is not an affirmative defense, the accused may rely solely on good character evidence for his defense").

177. MCM, *supra* note 5, R.C.M. 912 discussion.

language of the members' oath[178] or the military judge's preliminary instructions on the burdens of proof[179] to invoke in the members' minds their power to nullify the law.

For example, counsel could ask the panel questions such as: "You have taken an oath to impartially try, according to the evidence, the law, and *your conscience*, SGT Smith's court-martial—is there any member who cannot, for whatever reason, freely exercise their conscience in deciding SGT Smith's case?;" or "Does each member understand the military judge's instruction that if there is reasonable doubt as to the guilt of SGT Smith, that doubt *must* be resolved in his favor? Do each of you understand that, if the prosecution fails to prove its case, the law requires you to acquit SGT Smith?" Counsel could finish voir dire by asking, "Does any member feel the rule that the prosecution *must* prove its case, before you *may* use your discretion to find SGT Smith guilty, is unfair? Does any member feel it is unfair that you have no discretion and must acquit, if the prosecution fails to prove its case?"[180]

With regard to opening statements, the discussion following RCM 913(b) states, "Counsel should confine their remarks to evidence they expect to be offered which they believe in good faith will be available and admissible and a brief statement of the issues in the case."[181] Issues in the case may include equities that members may consider in arriving at a finding, such as the "good soldier" defense, selective prosecution of the accused, or the fundamental unfairness or pettiness of the prosecution. Defense counsel may properly ask the members to render individualized justice in each case. Counsel may choose to use their opening statement as a vehicle to bring these, and other issues, to the panel's attention as early in the case as possible. The COMA endorsed the front-loading of this type of information in *United States v. Jefferson*,[182] in which the court held that the defense should have been permitted to inform the members of a man-

178. *See supra* note 164 and accompanying text.

179. *See supra* notes 165-66 and accompanying text.

180. For an example of a jury nullification theme communicated during voir dire in a recent court-martial, see Appendix B, *infra*.

181. MCM, *supra* note 5, R.C.M. 913(b) discussion.

182. 22 M.J. 315 (C.M.A. 1986).

datory minimum life sentence in the findings portion of trial to impress the panel members with the seriousness of the case.[183]

Witness examination is another area in which counsel can sow the seeds of jury nullification before closing argument. The discussion following RCM 913(c)(4) states, "The military judge should not exclude evidence which is not objected to by a party except in extraordinary circumstances. Counsel should be permitted to try the case and present the evidence without unnecessary interference by the military judge."[184] Therefore, absent an objection from the prosecution sustained by the military judge, counsel can bolster their jury nullification theme through selective direct and cross-examination.

If all else fails, jury nullification themes can be carried over into the sentencing phase of trial.[185] Rule for Courts-Martial 1001 states that "[a]fter findings of guilty have been announced, the prosecution and defense may present matter pursuant to this rule to aid the court-martial in determining an appropriate sentence."[186] This includes the defense presenting "evidence in extenuation or mitigation or both." [187]

Of course, prosecutors may, and in appropriate cases should, argue that jury nullification is not relevant to findings or sentencing. Although this relevance argument carries some weight regarding findings, as discussed above, it carries less weight with sentencing. While sentencing evidence offered by the prosecution under RCM 1001(b) is somewhat limited in scope, evidence offered by the defense under RCM 1001(c) is not as limited. In fact, the CAAF has interpreted the scope of acceptable content of an accused's unsworn statement, offered under RCM 1001(c)(2)(C), as very broad.[188] Furthermore, the rules expressly allow the military judge to

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183. *Id.* at 329.

184. MCM, *supra* note 5, R.C.M. 913(c)(4) discussion.

185. Appendix B of this article details a recent court-martial in which the defense carried its jury nullification strategy from voir dire through sentencing. The case ended with the panel convicting the accused, but imposing only a one-grade reduction and reprimand. *See infra* app. B.

186. MCM, *supra* note 5, R.C.M. 1001(a)(1).

187. *Id.* R.C.M. 1001(a)(1)(B).

188. *See, e.g.*, United States v. Britt, 48 M.J. 233 (1998); United States v. Jeffery, 48 M.J. 229 (1998); United States v. Grill, 48 M.J. 131 (1998). The defense may not present evidence or argument that impeaches the prior guilty findings of the court, however. *See* United States v. Teeter, 16 M.J. 68 (C.M.A. 1983).

relax the rules of evidence during presentation of evidence in extenuation or mitigation.[189]

Some may contend that if a case reaches the sentencing phase, then by definition the panel did not invoke its power of jury nullification because in the military justice system, the members, not the judge, sentence the accused. Although "no punishment" is an authorized sentence in most cases, the sentences for specific offenses usually fall within certain ranges.[190] Therefore, a panel that recognizes that some degree of punishment is expected, but wishes to invoke jury nullification, may render an unusually light sentence. As such, counsel who fail to persuade one-third or more of the panel to acquit should continue to press jury nullification themes in sentencing. This tactic might persuade the panel members to bring back an "unusual" sentence that is "too light, almost [a] type of jury nullification."[191]

VI. Jury Nullification Instructions—Analysis of Options

Military judges have a sua sponte duty to instruct on special defenses reasonably raised by the evidence.[192] Moreover, military judges are required to give a requested instruction if the issue is reasonably raised by the evidence, is not adequately covered elsewhere in anticipated instructions, and the proposed instruction accurately states the law concerning the facts of the case.[193] As discussed above, however, jury nullification is not a defense. Furthermore, under current case law, military judges do not err when they decline to give a jury nullification instruction.[194] Thus, military judges clearly are not required, sua sponte or otherwise, to instruct on jury nullification. Essentially, current case law permits courts-martial to ignore or look the other way, instead of directly addressing this power historically and inherently held by the panel.

Military judges have a number of options if counsel or the panel asks for an instruction about jury nullification: first, judges may tell the mem-

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189. *See* MCM, *supra* note 5, R.C.M. 1001(c)(3).

190. *See generally* United States v. Rolle, 53 M.J. 187 (2000) (holding that although all parties, including the defense, expected some punishment, a predisposition to impose some punishment is not automatically disqualifying).

191. Everett Interview, *supra* note 77.

192. *See* United States v. Jones, 7 M.J. 441 (C.M.A. 1979).

193. United States v. Briggs, 42 M.J. 367 (1995).

194. *See* United States v. Hardy, 46 M.J. 67, 75 (1997).

bers they have already been instructed on the matter, and say nothing further; second, judges may repeat the instructions previously given; third, they can provide the instructions proposed by counsel; fourth, judges can coerce members into avoiding "incorrect" verdicts, as endorsed by English courts before 1640;[195] or fifth, the military judge can give a legally correct, restrictive pattern jury nullification instruction. As explained below, the latter option, though currently nonexistent, is the best of the five.

A. Say Nothing Further

Judicial, rather than jury, nullification supports the position that the best policy for military judges is to refuse to instruct the members about their power to nullify the law. Judicial nullification is the theory that if judges give confusing instructions that lay jurors cannot understand, these instructions effectively nullify the law.[196] Fear of judicial nullification drives attempts to simplify and reduce the number of instructions given from the bench. Taken to its extreme, however, the concept could lead to over-simplified, vague instructions that do not accurately communicate the state of the law. Jury nullification instructions must take into account legitimate concerns, be clear and concise, and state the law accurately.

In *United States v. Hardy*,[197] discussed in detail above, the trial judge, when asked by the panel members about their power to nullify the law, told them to consider all the instructions previously given. He elected not to instruct further about the panel's power to nullify the law.[198] Under the CAAF ruling that upheld this action, judges may simply refuse to instruct on jury nullification. Although trial judges will not err by choosing this option, it leaves the members to their own devices in deciding how to properly decide the case, which may lead to arbitrary, unpredictable delibera-

195. Bushel's Case, 124 Eng. Rep. 1006 (C.P. 1670).

196. *See* Michael J. Saks, *Judicial Nullification*, 68 IND. L.J. 1281 (1993). Judicial nullification gives defense counsel an alternative reason why they might seek to link jury nullification-type themes with legal defenses—to increase the number and complexity of instructions the panel will receive from the bench.

197. 46 M.J. 67 (1997).

198. *Id.* at 68. Apparently, the trial judge felt, and the CAAF agreed, that the general findings instructions adequately advised the members on their duties and powers.

tions that turn on the members' best guesses about the limits of their authority.

B. Repeat Previous Instructions

Another possible response to panel inquiries or counsel requests about jury nullification is for the judge to repeat previous instructions. For example, the military judge in *Hardy* would have accurately responded to the panel's question by simply repeating the following *Benchbook* instructions:

> I . . . instruct you on the law applicable to this case. You are required to follow [these] instructions . . . . This rule applies throughout the trial including closed sessions and periods of recess and adjournment . . . . [I]t is your duty to hear the evidence and determine whether the accused is guilty or not guilty . . . .[199]
>
> . . . .
>
> [T]he accused is presumed to be innocent until (his) (her) guilt is established by legal and competent evidence beyond a reasonable doubt; . . . if there is reasonable doubt as to the guilt of the accused, that doubt must be resolved in favor of the accused, and (he) (she) must be acquitted; and Lastly, the burden of proof to establish the guilt of the accused beyond a reasonable doubt is on the government . . . . However, if, on the whole of the evidence, you are satisfied beyond a reasonable doubt of the truth of each and every element, then you should find the accused guilty . . . . Each of you must impartially decide whether the accused is guilty or not guilty in accordance with the law I have given you, the evidence admitted in court, and your own conscience.[200]

The first paragraph clearly lays out the duties of the military judge and the panel members. The "must/should" language, and the last four words of the second paragraph, go to the heart of the panel's power to find a criminal defendant not guilty despite the law and evidence of the case. Before counsel raised the issue of jury nullification in *Hardy*, the trial judge appar-

199. BENCHBOOK, *supra* note 7, at 36-37.
200. *Id.* at 52-53.

ently gave the members findings instructions, including those set forth above.[201] Hence, one can consider *Hardy* as supporting the position that the correct response for the military judge is to simply repeat correct findings instructions.

In any case, a military judge may, in response to panel inquiries, set forth instructions previously given to the members.[202] Care must be given, however, not to over-emphasize some parts of the instructions. Practically speaking, absent the adoption of a pattern instruction as discussed below, re-instruction is the best method for everyone concerned (members, judge, counsel, and the accused) to address jury nullification issues.

C. Give an Instruction Proposed by Counsel

Under current case law, the final possible response to a jury nullification issue is for counsel to submit an instruction for the military judge to give to the panel. The *Manual for Courts-Martial* states that any party may request that the military judge instruct the members on the law as set forth in the request.[203] The military judge's decision to give requested instructions is based on the issues raised during trial. Ordinarily, the military judge must give a requested instruction, but he is not required to give the specific instruction submitted by counsel.[204]

Notably, the CAAF did not hold in *Hardy* that it is error for military judges to give jury nullification instructions. It simply held that because no "right" to jury nullification exists; the military judge did not err in declining to give such an instruction.[205] Therefore, it remains proper for defense counsel to request a nullification instruction, and in appropriate cases, a military judge might elect to give such an instruction. The most significant hurdle facing counsel seeking an instruction is that opposing

201. *See Hardy*, 46 M.J. at 68.

202. *See* MCM, *supra* note 5, R.C.M. 920(b).

203. *See id.* R.C.M. 920(c).

204. *Id.* R.C.M. 920(c) discussion.

205. *Hardy*, 46 M.J. at 75. Judicial discretion in this area is not unique to the military criminal justice system. In *United States v. Powell*, 955 F.2d 1206, 1213 (9th Cir. 1991), the Court of Appeals for the Ninth Circuit expressly ruled that jury nullification instructions are a discretionary matter for the trial judge. *Id.* at 1213. *But see* United States v. Cooley, 787 F. Supp. 977, 992 (D. Kan. 1992) (holding nullification instructions should not be issued to the jury).

counsel and the bench will likely never agree on an appropriate instruction to give.[206]

D. Mislead or Coerce Panel Members

Both civilian and military courts recognize the power of jury nullification. To deny that this power exists through contrary instructions is misleading. Ordering a panel to find an accused guilty, despite the fact the members' own conscience is leading them toward a finding of not guilty, is impermissibly coercive.[207]

To propose that judges in modern American courts give misleading instructions to the jury sounds preposterous. Yet, that is exactly what the trial judges did in *United States v. Sanchez*[208] and *United States v. Thomas*.[209] As previously discussed,[210] the trial judge in *Sanchez* refused to answer the jury's direct question about their ability to ignore the law, and threatened the removal of any juror who failed to follow the law.[211] In

206. An example of such an instruction appears in Korroch and Davidson's article *Jury Nullification: A Call for Justice or an Invitation to Anarchy?*, *supra* note 101, at 148. Their instruction reads:

> To reach a verdict you believe is just, each of you may consider the evidence presented on your own common sense, your knowledge of human nature and the ways of the world. If you determine that the accused has committed an offense, but you cannot in good conscience support a guilty verdict, you cannot be required to do so. However, you should exercise with great caution your power to acquit an accused you believe has committed an offense.

Id.

207. *Id*. at 69 n.5; *see also* BENCHBOOK, *supra* note 7, at 53 n.1.

208. 58 Cal. App. 4th 1435 (Cal. App. 2d 1997).

209. 116 F.3d 606 (2d Cir. 1997).

210. *See supra* notes 59–62 and accompanying text.

211. *Sanchez*, 58 Cal. App., 4th at 1447.

Thomas, the federal district court judge dismissed a juror because the juror stated that he would not follow the judge's instructions.[212]

Sanchez and *Thomas* are not far removed from the English trials held between 1200 and 1600 A.D.—a time when English judges could and did force jurors to reconsider their "incorrect" verdicts.[213] Threatening to remove individual jurors from a jury is similar to threatening to fine jurors because both acts are coercive. Furthermore, the judicial act of interviewing jurors individually to investigate if a particular member is predisposed to disregard the court's instructions on the law creates a modern American Star Chamber.[214] In this Star Chamber, judges conduct in camera investigations of jurors that may violate their oaths by daring to nullify the law. The military justice system must avoid sliding down this slippery slope by heeding Chief Justice Vaughan's time-honored principal of non-coercion of jurors.[215]

E. Give a Pattern Jury Nullification Instruction

The best solution to address the jury nullification dilemma is a tightly worded, restrictive pattern instruction. This is by no means a novel solution—Chief Justice John Jay adopted this approach over two hundred years ago.[216] Case law, the Rules for Courts-Martial, the Military Rules of Evidence, and model instructions from state and federal criminal courts are among the many proper sources for instructions. Most instructions given in military practice, however, come from the *Military Judges' Benchbook*.[217] The *Benchbook* is used to "assist military judges . . . in the drafting of necessary instructions to courts. Since instructional requirements vary in each case, the pattern instructions are intended only as guides . . . ."[218]

The absence of a pattern *Benchbook* instruction regarding jury nullification creates an atmosphere in which justice may turn on a panel's arbitrary acts taken without explicit guidance from the bench. As the District

212. *Thomas*, 116 F.3d at 624. *United States v. Hardy*, 46 M.J. 67 (1997), in which the CAAF affirmed the trial judge's decision not to direct the members to vote for a finding of guilty, *id.* at 69 n.5, supports the position that the trial judge's instructions in *Thomas* were coercive.

213. *See* Lawson, *supra* note 16, at 137.

214. *See generally id.* at 137-38.

215. *See generally* Bushel's Case, 124 Eng. Rep. 1006 (C.P. 1670) (discussed *supra* notes 24-28 and accompanying text).

of Columbia Circuit noted, "The right to equal justice under the law inures to the public as well as to individual parties to specific litigation, and that right is debased when juries at their caprice ignore the dictates of established precedent and procedure."[219] Military panels cannot be expected to adhere to the "dictates" of established precedent and procedure if they are not advised, or are ill-advised, about an important legal issue that may decide the case.

A starting point for a possible pattern instruction, below, draws from the *Benchbook*, a suggested instruction from a law review article,[220] and from the CAAF's opinion in *United States v. Hardy.*[221]

> [There is a division of responsibilities at a trial by court-martial.] I . . . instruct you on the law applicable to this case[, and y]ou are required to follow my instructions on the law [in deciding whether the accused is guilty or not guilty] . . . .[222] A court-martial panel does not have the right to nullify [or ignore] the lawful instructions of a military judge.[223]
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> [As I told you earlier,] the accused is presumed to be innocent until (his) (her) guilt is established by legal and competent evi-

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216. *See* Georgia v. Brailsford, 3 U.S. (1 Dall.) 1 (1794). In *Brailsford*, Chief Justice Jay, presiding over a rare jury trial before the Supreme Court, instructed the jury:

> It may not be amiss, here, Gentlemen, to remind you of the good old rule, that on questions of fact, it is the province of the jury, on questions of law, it is the province of the court to decide. But it must be observed that by the same law, which recognizes this reasonable distribution of jurisdiction, you have nevertheless a right to take upon yourselves to judge of both, and to determine the law as well as the fact in controversy. On this, and on every other occasion, however, we have no doubt, you will pay the respect, which is due to the opinion of the court: For, as on the one hand, it is presumed, that juries are the best judges of facts; it is, on the other hand, presumable, that the court are the best judges of law. But still both objects are lawfully, within your power of decision.

Id. at 4.

217. BENCHBOOK, *supra* note 7.

218. *Id.* para. 1-1(b).

219. *See* United States v. Gorham, 523 F.2d 1088, 1098 (D.C. Cir. 1975).

220. Korroch & Davidson, *supra* note 101.

221. 46 M.J. 67 (1997).

222. *Id.* at 36.

223. *Id.* at 75.

> dence beyond a reasonable doubt; . . . if there is reasonable doubt as to the guilt of the accused, that doubt must be resolved in favor of the accused, and (he) (she) must be acquitted; and . . . the burden of proof to establish the guilt of the accused beyond a reasonable doubt is on the government . . . . However, if, on the whole of the evidence, you are satisfied beyond a reasonable doubt of the truth of each and every element, then you should find the accused guilty . . . . Each of you must impartially decide whether the accused is guilty or not guilty in accordance with the law I have given you, the evidence admitted in court, and your own conscience.[224]
>
> If you determine that the accused has committed an offense, but you cannot in good conscience support a guilty verdict, you cannot be required to do so. However, you should exercise with great caution your power to acquit an accused you believe has committed an offense.[225]

This instruction is legally accurate and sufficiently restrictive to respond to the reality that jury nullification exists as a safety valve for unusual cases. It does not strip away the panel's ability to render individualized justice, but does caution the members to be extremely selective about when to take the law into their own hands. This type of instruction would act as a brake on the defense's use of a jury nullification theory in routine cases, while still allowing the panel the knowledge that they have the power to make exceptional findings in exceptional cases. As such, by keeping the court-martial system intellectually honest, this instruction has the dual benefits of safeguarding the accused's right to a fair trial and ensuring greater predictability in the administration of justice.

VII. Conclusion

The military legal community has no choice but to trust panel members with their power to nullify the law, a power they inherently and obvi-

224. BENCHBOOK, *supra* note 7, at 52-53.
225. Korroch & Davidson, *supra* note 101.

ously hold. But, the tougher issue remains how and what do we tell the members about their power?

Unlike randomly selected jurors, military members are personally selected by the convening authority as "best qualified for the duty by reason of age, education, training, experience, length of service, and judicial temperament."[226] The military's blue ribbon court-martial panels should be treated as professionals and be informed about their broad power to render justice. The bench and bar should have the confidence to trust members to exercise their nullification power in a responsible way, without undermining the good order and discipline of the military services.

Whether defense counsel may argue jury nullification directly to a panel remains an open question of law.[227] Some argue that informing military members about their power to nullify might countermand discipline and foster disrespect for the law.[228] But, the law recognizes the inherent power of a jury to nullify. Law does not exist in a vacuum; courts-martial consider the facts and circumstances of each case individually. If Congress felt nullification was a true threat to military discipline, it would pass legislation to limit, restrict, or remove a panel's power to do justice in "the teeth of both law and facts."[229]

In practice, even when counsel are barred from explicitly referring to jury nullification, they can implicitly communicate nullification concepts to the panel throughout the case. Counsel can most notably accomplish this by focusing on the language in the panel's oath and in the military judge's instructions. Whether or not counsel are allowed to explicitly argue nullification concepts, military judges should use their discretion and instruct the members about their nullification power in appropriate cases, rather than remain silent and deny them this information. In fact, trial judges may be motivated, in rare cases, to give jury nullification instructions sua sponte if they perceive the accused was overcharged, gov-

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226. UCMJ art. 26(d)(2) (2000).

227. *See Hardy*, 46 M.J. at 67.

228. *See, e.g.*, *id.* at 72.

229. Horning v. District of Columbia, 254 U.S. 135, 138 (1920). For example, in theory Congress could give military judges the power to direct guilty verdicts.

ernment agents committed misconduct, or the prosecution over-relied on unsavory or unreliable informants.[230]

The most common jury nullification scenarios, however, occur when the defense raises the issue though argument, the panel asks about its power to nullify, or counsel request instructions. In these instances, clear guidance should be available to all military justice practitioners in the form of a pattern nullification instruction. Such an instruction would best correspond with the reality that the military justice system is flexible; it allows panels to render individualized justice in every case.

This solution best serves the administration of justice because it places the bench and bar on the "same sheet of music" and keeps the court-martial system intellectually honest. Further, providing the panel with full knowledge about their powers and responsibilities best allows the members to carry out their duties. A restrictive, but legally correct, instruction prevents the defense from raising jury nullification issues in routine cases. It would force the defense to raise the issue only in exceptional cases in which jury nullification would truly serve the ends of justice.

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230. *See generally* Lynch, *supra* note 128.

Appendix A

General Court-Martial (Summer of 2000)
(All names below are pseudonyms; citation omitted)

Specialist Taylor was accused of rape, forcible sodomy, adultery, and indecent acts with another. He claimed all acts were consensual. Before trial, he stipulated that he was married and the woman he had sex with was not his wife. Specialist Taylor pled not guilty to all charges and specifications, including adultery. The court-martial lasted two days before an enlisted-member panel.

The defense theory as to the charges of rape and forcible sodomy, as outlined in its opening statement and closing argument, was that the acts were consensual. The defense counsel argued the indecent act (placing his finger in her anus) did not occur. Finally, as to the "consensual offense" of adultery and lesser-included offense of sodomy, the defense strategy was to invoke jury nullification through voir dire, presentation of evidence, and argument. The defense presented a good soldier defense and raised the issue of mistake of fact as to consent with regard to the rape charge. The defense opened its case by stating:

> In a "he said/she said" date rape case, it is almost always the case that only the participants will ever know what really happened between them. That is exactly the case here today. Only SPC Taylor and PVT Jones will ever know what happened between them in SPC Taylor's quarters. Despite this, the defense is confident that after hearing the facts and circumstances surrounding PVT Jones's decision to go to SPC Taylor's quarters, to watch movies and drink with him, and the later CID investigation of her claim that she was raped, you will conclude that SPC Taylor did not rape PVT Jones.
>
> What the defense asks you to pay particular attention to is PVT Jones's activities before and after she had sex with SPC Taylor. Also, please pay particular attention to SPC Taylor's conduct before and after he had consensual sex with PVT Jones. Finally, take into consideration the evidence produced by CID's investigation and remember that if this outside evidence is inconclusive or contradicts with PVT Jones's claims—well, remember SPC Taylor is presumed innocent. The burden of proof remains on the trial counsel to prove beyond a reasonable

> doubt that SPC Taylor committed an offense under the Uniform Code of Military Justice.
>
> You may have noticed the adultery charge on the flier. Specialist Taylor will take the stand and testify about the consensual sex he had with PVT Jones. Now, SPC Taylor is married and yet he has pled not guilty to the adultery charge. But remember, the burden remains on the trial counsel to prove each and every element of that offense, and all the other charged offenses, beyond a reasonable doubt. This is based on the facts as you determine them to be after hearing evidence in this court-martial, through law that you will receive from the military judge, and you exercising your own conscience.
>
> The defense is confident that after you hear the evidence, receive the law, and apply your conscience to this case, you will be able to find SPC Taylor innocent of rape and not guilty to all charges and offenses.

The second day of trial, the defense completed its case by arguing the following in its closing argument:

> In a "he said/she said" date rape case, only the participants will ever actually know exactly what happened between them. Specialist Taylor says the sex was consensual and that he did not place his finger in PVT Jones's anus. Private Jones says the sex was forcible. She claims SPC Taylor forcibly undressed her, that there was a struggle, and that she fought and kicked as he ripped off her shirt. She claims she was raped. She says that during this rape, SPC Taylor committed forcible sodomy on her by holding her down and placing his mouth on her vagina, and that he also forced his finger into her anus.
>
> The defense is confident that based on the evidence you will find that no struggle or rape occurred. Even though none of us were present, when we look at PVT Jones's actions before and after she had sex with SPC Taylor, when we look at SPC Taylor's actions before and after he had sex with PVT Jones, and when we look at the evidence discovered during CID's investigation, we can tell that SPC Taylor is telling the truth. No struggle, no rape, no forcible sodomy, or indecent act occurred. When you analyze the evidence to determine the facts of this case, apply the

law given to you by the military judge, and exercise your conscience, you will be able to find SPC Taylor innocent of rape and forcible sodomy and not guilty to all the other charged offenses.

The burden of proof remains on the government to prove each and every element of each offense beyond a reasonable doubt. In this case, the prosecutor can't meet this burden. Let's take adultery as an example: Specialist Taylor told you the sexual activity between him and PVT Jones was consensual. He also told you he is married and his wife no longer lives with him. You can find SPC Taylor not guilty of adultery because under the law the prosecutor must prove that this consensual relationship somehow prejudiced the good order and discipline of the service. The CID agent who testified yesterday told you that if it weren't for the rape and forcible sodomy allegations, his office would never have investigated PVT Jones's story. In fact, he told you that CID regulations do not allow agents to investigate allegations of adultery or consensual sodomy standing alone. Under these facts, you can apply the law and your conscience and find SPC Taylor not guilty of adultery.

You heard the testimony of SPC Taylor's supervisors, coworkers, and subordinates. You heard me read affidavits from Sergeant First Class (SFC) Johnson and SFC Hearst. Both of these senior noncommissioned officers have known SPC Taylor for many years. Every witness, every one of them, told you the same thing. They told you SPC Taylor is honest, nonviolent, and law abiding.

Private First Class (PFC) Cable and SPC Booth both testified on behalf of SPC Taylor. Private First Class Cable was PVT Jones's roommate when she first made her allegations against SPC Taylor. Specialist Booth was PVT Jones's sponsor at the unit. Both PVT Jones's roommate and her sponsor took the stand and testified on behalf of SPC Taylor. They told you SPC Taylor is honest, nonviolent, and law abiding. But by taking the stand and testifying as defense witnesses, didn't they also tell you what they think about PVT Jones's allegations?

Private Jones wants you to believe she was drunk because she knows she did not fight or resist. She knows SPC Taylor did not use force when he had sex with her. That's what the evidence

shows. It also shows she was not drunk because the truth is SPC Taylor did not rape her.

So what is PVT Jones's motive to lie? Maybe her friends jumped to conclusions when she came back to the barracks at 9:00 a.m. the next morning. We know PVT Jones did not call the military police. We know her roommate, PFC Cable, who was the first person to talk to her that morning, did not call the police. It was another soldier, PVT Janice Smith, who took it upon herself and decided to call the police. Maybe once the police were involved, PVT Jones was simply too embarrassed to tell the truth.

Once PVT Jones made her allegations, she began to receive favorable treatment from her unit. She was able to take free leave and was transferred to easier duty. Remember, this is a soldier who rode her medical profile from basic training to her unit. She knew about getting easy duty.

Maybe PVT Jones was simply afraid of what her mother would think of her if she knew the truth. We know that when PVT Jones took her free leave she didn't go home to her mother. We know it was her mother who got involved and got the leave extended. We also know her mother wrote the command asking for her daughter to be transferred to the reserves, asking to get medical treatment for rape trauma through the civilian system rather than from the military, and asking for all her G.I. Bill college money.

We may never know why PVT Jones decided to lie, but one thing is clear; the evidence does not support her testimony. If she was raped, why did she pack and take an overnight bag to SPC Taylor's house? Why did she stay at his house for ten hours? If she was afraid, why didn't she call her best friend on her cell phone? Why didn't she leave and go upstairs to her sponsor's quarters? Remember, SPC Booth testified that she had had PVT Jones over to her home before. Specialist Taylor's quarters are on the first floor; if PVT Jones wanted to get away, why didn't she go out the patio doors or out a window? Why did SPC Taylor wear a condom if he was a rapist? If he was really a rapist, why did he bother to give his partner oral sex? Why did the sex take place in the bedroom and not out on the couch where the kissing

> began? If PVT Jones's version of events is to be believed, why did the Army doctor who did the medical exams the next morning report there were no injuries to either SPC Taylor or PVT Jones? Why did the CID laboratory fail to find any damage or stretching on any of the clothing PVT Jones wore that night?
>
> As you go back to deliberate, ask yourself, who brought you the doctor that did the medical exams? Who brought you the pictures that were taken at these exams? Who brought you the drinking glasses that were similar to the ones used that night? Who brought you the shirt PVT Jones says she heard tear that night? Who brought the CID lab reports on the clothing? Who brought you the lab reports on the fingernail scrapings? Who brought you the gin bottle similar to the one used that night? The defense brought you all of this evidence! Don't you wonder why the government didn't bring you this evidence? Don't you wonder why they didn't bring you any physical evidence? Don't you wonder why they didn't tell you about the tests CID ran? They didn't because these things didn't help their case. The evidence helps the defense, and the prosecution knew that! They refused to give you this important evidence because every bit of it hurts their case. It shows that their complaining witness, PVT Jones, lied. It shows you that SPC Taylor is telling the truth!
>
> When you go back to the deliberation room, you will be in closed, secret session. You will weigh the facts, the law, and your conscience, and cast a secret, written ballet. When you cast your ballot, please use your authority to declare SPC Taylor innocent of rape and forcible sodomy and not guilty to all the other charged offenses.

After two and one-half hours of deliberation, the panel asked the military judge whether sodomy required prejudice to good order and discipline, like adultery. The military judge said that sodomy only required the act itself and that the prosecution did not have to prove any prejudice to the unit or the military service occurred as a result.

The panel returned twenty minutes later and found SPC Taylor not guilty of all offenses.

Appendix B

BCD Special (Spring of 2000)

(All names below are pseudonyms; citation omitted)

Sergeant Lanny was a military police officer who commanded a HMMWV that went off the road and overturned. Neither he nor his driver was injured in this one-vehicle accident. The two soldiers told their superiors that they were run off the road, when in fact the accident occurred because they attempted to hit a road marker. Sergeant Lanny was accused of dereliction of duty, making two false official statements, willful damage to military property of more than $100, willful and wrongful damage to German property of less than $100, wrongfully influencing the statement of a subordinate, solicitation to obstruct an investigation, and solicitation to destroy German property.

In attempting to have his case disposed of as an Article 15, a summary court-martial, or an administrative discharge, SGT Lanny provided his command with a written statement truthfully detailing what happened. Under Military Rule of Evidence 410, the military judge suppressed this statement. Sergeant Lanny pled not guilty to all charges and specifications. After a day of motions, the contest lasted two additional days before an enlisted-member panel.

The defense strategy of the case was to seek jury nullification and to present extenuation and mitigation evidence from voir dire through sentencing, if necessary. The defense also presented a good soldier defense and raised the issue of mistake of fact as to the dangerousness of attempting to hit the road marker.

The defense planted the seeds for jury nullification during voir dire by asking questions such as:

> Is there any member who has been involved in a traffic accident? How did it feel?
>
> Is there any member who has swerved off the road? How did it feel?
>
> Sergeant Lanny was not the driver of the vehicle. If the military judge instructed you that the prosecution must prove beyond a reasonable doubt that SGT Lanny was the proximate cause of the

damage to government and German property, could you follow that instruction? (The military judge then read the instruction).

If the military judge instructs you that the defense of accident is a complete defense to the allegations regarding damage to government and German property, could you follow that instruction? (The military judge then read the instruction).

Is there any member who has had a friend, subordinate, neighbor, or family member who has caused a traffic accident?

Is there any member who has had a friend, subordinate, neighbor, or family member who has been accused of covering up the cause of a traffic accident?

Is there any member who has served on a military or civilian jury that decided a case involving allegations that someone caused a traffic accident?

Is there any member who has served on a military or civilian jury that decided a case involving allegations that someone covered up the cause of a traffic accident?

Is there any member who has referred court-martial charges alleging that someone caused or covered up the cause of a traffic accident?

Is there any member who has forwarded with recommendations charges alleging that someone caused or covered up the cause of a traffic accident?

Is there any member who has preferred court-martial charges alleging that someone caused or covered up the cause of a traffic accident?

Is there any member who has served as a summary court-martial officer in a case where someone was alleged to have caused or covered up the cause of a traffic accident?

Is there any member who has administered nonjudicial punishment for a soldier accused of causing or covering up the cause of a traffic accident?

> Is there any member who has done an *Army Regulation 15-6* investigation on a traffic accident?

As it turned out, all members had been involved in investigating at least one traffic accident and had a relative or close friend that had been involved in an accident. None of the members had ever seen a traffic accident case that did not involve drugs or alcohol disposed of beyond the non-judicial punishment level.

The defense opened its case by stating:

> The evidence will show that SGT Lanny is a top-notch duty performer. He is a motivated soldier and a dedicated noncommissioned officer. The charges against SGT Lanny grow from a one time display of poor judgment that was completely outside of SGT Lanny's character.
>
> Private Brown was a brand new driver who had never worked with SGT Lanny before. She was his driver during an exercise where military police would go ahead of convoys, performing a reconnaissance mission, to see if the large tracked vehicles could get through. To do this for several units at the same time, the MPs would need to pass or "leap-frog" past convoys. Because the roads were narrow, and the tracked vehicles in the convoys and the HMMWVs the MPs drove were wide, MPs would need to pass using the shoulder of the road. You will hear testimony from SGT Lanny that he trained his drivers to safely leapfrog convoys, by having them practice driving on the shoulders or edges of the road when no convoys were around.
>
> You might think this is an easy or clear-cut case. Maybe it would be easy to brief, or to do a report of survey on, or even write a bad NCOER or a letter of reprimand. But, in this setting—a court-martial—this is not an easy case. The government must bring evidence to court to prove SGT Lanny committed a crime under the Uniform Code of Military Justice. Evidence may conflict. It may raise issues in your mind. The defense believes the evidence will raise issues about:
>
> What was the true cause of the accident? An omission by SGT Lanny or some other cause—like hitting a culvert hidden in high grass?

> If there was an omission, was it truly willful, or simply an honest mistake or misjudgment?
>
> Why did PVT Black and SGT Lanny try to hit the road marker in the first place? Were they lawfully hitting these poles in the course of their duties?
>
> Did SGT Lanny and PVT Black damage any of these road markers? And, if so, did they specifically intend to cause damage?
>
> At the scene of the accident did SGT Lanny really attempt to influence PVT Black's statement, or did PVT Black do this on her own?
>
> If SGT Lanny did try to influence PVT Black's statement, what were his goals or intent in doing so?
>
> Now, the facts are clear in some areas. This was a one-vehicle accident. A HMMWV went into a ditch. Private Black was the driver and SGT Lanny was the vehicle commander. This accident happened at low-speed. There were no significant injuries to anyone. This is not a DUI case; there was no alcohol or drugs involved in the accident.
>
> In other areas, the facts are not as clear. Did SGT Lanny tell PVT Black to hit the pole? What caused the HMMWV to turn over? How did SGT Lanny's initial talk with SFC Tomy snowball into an investigation? Ultimately, what charges can the prosecution prove to you, the members, beyond any reasonable doubt?

The defense did not argue for jury nullification in its closing argument, choosing instead to focus on burdens of proof and the technicalities of the law. Sergeant Lanny was convicted of all charges and specifications except willful damage to military property of more than $100 and willful and wrongful damage to German property of less than $100. For the latter two offenses, SGT Lanny was convicted of the lesser-included offenses of

suffering military property to be damaged through neglect and attempted damage of German property.

The defense argued for a very lenient sentence, stating:

> Sergeant Lanny is a good soldier. You know he is a good soldier because his driver, PVT Black, his peers, SGT Rolex and SGT Heinz, and his supervisors, SFC Jack and CPT Jefferson, all told you so. You will also have before you, in your deliberations, SGT Lanny's NCOER, his APFT scorecards, his weapons qualification records, and his awards. With these documents, you will be able to see for yourselves what a truly outstanding soldier SGT Lanny has been—and can continue to be.
>
> Sergeant Lanny has never been in trouble before. He has never been offered nonjudicial punishment. He has not even had any negative counseling during his entire time on active duty. And remember, the military judge has instructed you that you can take into consideration the fact that Sergeant Lanny's multiple charges grew out of a single transaction.
>
> Sergeant Lanny has extremely high rehabilitative potential. Now, he did choose to place the burden of proof on the trial counsel to prove the elements of each and every offense he was alleged to have committed. But, he did not B.S. this court. He took the stand, swore to tell the truth, and honestly told you what happened. Just now—in sentencing—he gave a statement and told you how sorry he is. Sergeant Lanny loves the Army. He wants to be retained and continue to serve his country.
>
> Sergeant Lanny had the honesty and courage to admit his errors. Early in the investigation, he voluntarily waived his rights and confessed his wrongdoing to his platoon leader. At his first opportunity he apologized to his company commander, CPT Jefferson. It was at about this time he was told by his first sergeant that he would get a field-grade article 15 for the incident. Sergeant Lanny told you how he was planning on accepting this article 15 and wanted to soldier his way back into the good graces of the members of his unit.
>
> To a large extent, SGT Lanny has already been punished for his wrongdoing. He told you about the shame he feels. He con-

fessed to his platoon later on the 30th of September, but did not have his case resolved until today, the 1st of March. For SGT Lanny, this meant six full months of uncertainty. We can all remember how it felt to cross your mother and hear her say, "Wait 'till your Dad gets home." Sergeant Lanny has had to wait for six months for Dad to come home! He has had to deal with his shame and that horrible "wait 'till Dad gets home" feeling for six whole months!

A report of survey has already been completed. Sergeant Lanny and PVT Black have been held jointly liable for the loss of $1451 to the U.S. Army. So, as far as financial loss to the government is concerned, it has already been addressed.

You heard both SFC Jack and CPT Jefferson talk about the impact of a federal criminal conviction on a military police officer. The bottom-line is simple—after a conviction, they can no longer serve in that capacity.

Then, there is the basic issue of fairness. Other noncommissioned officers in the company intentionally hit German road markers. Sergeant Rolex and SGT Sam both told you they also trained their drivers by instructing them to hit markers. Yet, they were never prosecuted in a trial by court-martial. Private Black, SGT Lanny's driver, told you she willingly hit these road markers. Yet, she too was never prosecuted in a trial by court-martial. In fact, all three—SGT Rolex, SGT Sam, and PVT Black—received no punishment at all!

In his unsworn statement, SGT Lanny told you he knows he did wrong and that he would have willingly accepted an article 15 or a summary court-martial. He told you he knew a federal criminal conviction would strip him of his ability to serve as a military police officer, and that his deepest desire is to continue to serve. First Sergeant Nuk told you this was a consideration when he first recommended a field-grade article 15. Both the first sergeant and CPT Jefferson tried to keep this case within the unit rather than sending it to court-martial.

What is society's interest in this case? Serving in Bosnia, we all learned that under the rules of engagement you only use the amount of force necessary to accomplish the mission. Well, the

military justice system is just like the rules of engagement. We only use the amount of force or punishment necessary to do justice!

Society generally recognizes five reasons to punish. First, to rehabilitate the accused. As we discussed earlier, SGT Lanny's rehabilitative potential is very, very high. Second, to punish the wrongdoer. Here, SGT Lanny has already been punished by the shame and uncertainty he felt in the six months leading up to this trial. Due to the conviction alone, he will also face the harsh punishment of being unable to serve as a military police officer. Simply put, he has been punished enough by the conviction. The third reason to punish is to protect society. This is why we build jails and prisons. We put murderers, rapists, and others who injure people in jail in order to protect the rest of us. No one needs to be protected from SGT Lanny. There is no need in this case to consider confinement. The fourth reason we punish soldiers who violate the UCMJ is to maintain good order and discipline. But, SGT Lanny was, both before and after the accident, a credit to his unit and the profession of arms. The HMMWV accident and subsequent misconduct grew out of a single transaction that in no way reflects SGT Lanny's normal good character. If his conduct was truly prejudicial to good order and discipline, then why did PVT Black, SGT Rolex and SGT Sam—members of the unit who also admitted to intentionally hitting road markers—not get disciplined in any way, shape, or form? Finally, the fifth reason society punishes wrongdoing is to deter similar acts in the future, by both SGT Lanny and others who might know of his misconduct. You heard SGT Lanny's testimony, and can judge for yourselves, but I think it's fair to say there is no danger of SGT Lanny ever doing anything like this again. Furthermore, it's safe to assume SGTs Rolex and Sam, PVT Black, and all the other members of SGT Lanny's company will not intentionally hit road markers in the future. As such, there is no need to punish SGT Lanny in order to discourage this type of conduct in the future.

When you go back into your closed, secret deliberations, please take the time to read and consider SGT Lanny's good soldier packet. The defense asks you to consider retaining SGT Lanny in the United States Army; to impose a punishment at the unit rather then confining him; to limit any reduction in rank to

> rank of Specialist, not a complete reduction to the rank of private; and to not take any pay or allowances from him because money will be taken from him as part of the report of survey that has already addressed the government loss in this case.

The panel sentenced SGT Lanny to be reprimanded and reduced to the grade of specialist (E-4).

NATIONAL SECURITY PROCESS AND A LAWYER'S DUTY: REMARKS TO THE SENIOR JUDGE ADVOCATE SYMPOSIUM

April 23, 2002

JUDGE JAMES E. BAKER[1]
UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

Introduction

One of my favorite judicial comments, in one of my favorite cases, is Justice Frankfurter's comment about government in *Youngstown*.[2] This is what he wrote:

> Before the cares of the White House were his own, President Harding is reported to have said that government after all is a very simple thing. He must have said that, if he said it, as a fleeting inhabitant of fairyland. The opposite is true. A constitutional democracy like ours is perhaps the most difficult of man's social arrangements to manage successfully.

When I was asked to speak to you about national security process, I immediately thought of Fairyland, or more precisely I thought of Justice Frankfurter's comment as a place to start. First, it captures the plain truth, already known to this audience, that good government is difficult work.

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1. Judge Baker has been a judge on the United States Court of Appeals for the Armed Forces since September 2000. He previously served as Special Assistant to the President and Legal Adviser (1997-2000) as well as Deputy Legal Adviser (1994-1997) to the National Security Council (NSC). Judge Baker has also served as Counsel to the President's Foreign Intelligence Advisory Board and Intelligence Oversight Board, as an attorney adviser in the Office of the Legal Adviser, Department of State, as a legislative aide and acting Chief of Staff to Senator Daniel Patrick Moynihan, and as a Marine Corps infantry officer. He is the author, with Michael Reisman, of *Regulating Covert Action* (Yale University Press: 1992). Judge Baker was born in New Haven, Connecticut, and raised in Cambridge, Massachusetts. He is a graduate of Yale College (1982) and Yale Law School (1990), where he is currently a visiting lecturer. Judge Baker is married to Lori Neal Baker of Springfield, Virginia. They live with their daughter, Jamie, and son, Grant, in Virginia.

2. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 593 (1952).

This was true in 1952, and it is certainly true today, at a time when some look back to the 1950s as a time of danger, but relative simplicity.

September 11 changed so much about our lives and how we perceive national security. Harold Lasswell, in an earlier context, described the sharing of danger throughout society as the "socialization of danger,"[3] which he wrote was a permanent characteristic of modern violence; but not for America until September 11. The socialization of danger has made ordinary citizens participants in the national security process in a way not previously experienced. In addition, it has brought relatively unknown federal agencies, like the Federal Emergency Management Agency and the Centers for Disease Control, to the forefront of national security planning and response. And both of these occurrences have emphasized the importance of viewing terrorism and cyber security as problems requiring effective vertical and not just horizontal process.

Where most national security problems require coordination amongst federal agencies, homeland security is equally about coordination between federal, state, and local actors down to the level of first responder and the technician who spots the first medical anomaly. This vertical process will test the manner in which information is shared, resources allocated, and perhaps the level at which decisions of life and death, heretofore made by the President, are taken.

Second, Justice Frankfurter's comment suggests that government is particularly complex in a constitutional democracy. Frankfurter had in mind the interplay between constitutional branches. But constitutional democracy also means that all decisions are made according to law. And that means that sound Executive process must incorporate timely and competent legal advice. In some cases, legal review is dictated by statute, as in the case of the Foreign Intelligence Surveillance Act (FISA),[4] which requires the attorney general, or his designee, to approve requests for electronic surveillance or physical search before they are submitted to the FISA court. In other cases, the President has directed a specific process to ensure legal review in areas historically prone to peril, including certain intelligence activities. However, the majority of legal advice within the national security process is not directed, but is the product of practice, custom, and personal interchange between lawyer and client. That means that good process requires personal persuasion, presence, and value added, or

3. Harold D. Lasswell, *The Garrison State*, 46 AM. J. SOC. 459 (Jan. 1941).
4. Pub. L. No. 95-511 (1978) (codified at 50 U.S.C. §§ 1801-1829 (2000)).

the lawyer will find he or she is only contributing to decisions where legal review is mandated and then only as the last stop on the bus route. Constitutional democracy does not rest on such process.

Third, because I was asked to comment on the Kosovo air campaign as illustration, Justice Frankfurter's comment is also interesting in that it notes some skepticism as to whether President Harding actually said what he is understood to have said. After serving at the National Security Council (NSC) for seven years, I am not surprised at how often misperceptions emerge and how long they linger. With Kosovo, there remains a misperception that the President, as Commander-in-Chief, insisted upon approving all air targets. The reality was far different. Of the approximately ten thousand strike sorties against some two thousand targets during the campaign, the national security advisor and I reviewed two or three hundred individual targets, of which the president examined a subset. The President's review of targets was crisp; he would hear the descriptions, review the briefing materials, and at times raise questions. He expected issues to have been addressed before they reached him and that any still requiring resolution—perhaps those involving an ally—be quickly and clearly presented. This was not a ponderous process, but the kind of decision-making that one might expect, and that I expected, of a commander-in-chief. What made the process complicated, and sometimes dysfunctional, was not the U.S. chain of command, but the idiosyncrasies of a Northern Atlantic Treaty Organization (NATO) campaign within a framework of consensus decision-making involving nineteen democracies.

Now, while some of my NSC staff colleagues might put their version of a process talk on a single, yellow sticky, my version comes in an encyclopedic set. But you can thank Colonel [Richard] Rosen[5] that you are not getting that edition. I accept my temporal limitation in trying to describe a process, which depending on how you define national security, might include all aspects of our national life. Therefore, I intend to make a few comments about my prior role at the NSC, not out of any desire to tell my story to an audience too familiar with real war stories. Rather, I want to give you the context from which I draw three enduring duties of the

5. Colonel Richard D. Rosen is currently the Commandant of the U.S. Army Judge Advocate General's School, Charlottesville, Virginia.

national security lawyer: to uphold process, to educate, and to support and defend the Constitution.

My hope is that I will prompt you to think about what you do, how you do it, and how your work relates to the bigger picture of constitutional government, which after all is *not* "a very simple thing."

A. The Role of the Lawyer

Each President, agency head, and commander will adopt his or her own approach to legal advice, ranging from avoidance to active engagement. As a result, the manner in which lawyers provide their advice and at what stage of the process will vary; however, at the national level the essential participants will remain the same: the Attorney General, the Office of Legal Counsel, agency general counsel, and in areas of concern to us, the Joint Chiefs of Staff (JCS)/Legal, and the President's national security lawyers.

Traditionally, lawyers for the President have included the Counsel to the President and the NSC Legal Adviser. Practice has varied as to the relative role and weight of each and the extent to which other White House lawyers, such as the Deputy White House Counsel, are involved in national security decision-making, if at all. During my tour, the Legal Adviser reported to the National Security Adviser, and operated independent from, but in appropriate coordination with, the Counsel to the President, the President's senior legal adviser.

As NSC Legal Adviser, I performed three basic functions. First, I provided independent advice to the President, National Security Adviser, and NSC staff on all matters coming to the NSC or going to the President. Second, I served in effect as general counsel, reviewing personnel actions, responding to discovery requests, and administering the NSC's ethics program. I might note here that this program included application of the Hatch Act[6] prohibitions on partisan political activities by NSC staff. National security law is not all constitutional questions about use of force, but rather a relentless opportunity to apply principles of triage. One must appreciate that there is a difference between the "urgent" ethics question

6. Hatch Act Reform Amendments of 1993, 5 U.S.C. §§ 7321-7326 (2000).

about receipt of a gift and the urgent operational law question, unless the question comes from the President or National Security Advisor.

Finally, I coordinated the interagency legal process, ensuring that presidential decisions had appropriate interagency legal review and that the Principals and Deputies Committees had timely legal input. Where necessary, this was accomplished by generating interagency legal papers as background or by attending Principals and Deputies meetings to spot issues and answer questions, always with a view to honestly conveying agency positions of law, while at the same time ensuring that those positions were generated and tested on the President's timetable for decision. I learned early that if you wanted to know if the Defense Department (DOD) had authority to do something, to ask the State Department and vice versa.

The role of the Legal Adviser in this latter function has varied from administration to administration, depending on, among other factors, the personality of participants and the extent to which the office is perceived by agencies as facilitating national security process, as John Norton Moore has argued for a long time, or as a source of potential rival legal advice. I am squarely in the camp that sees the office as an important avenue by which agency counsel can provide meaningful input into presidential decision-making. In my view, NSC/Legal is the interagency legal community's best opportunity to have "eyes on" the presidential memo or meaningful input into a Principals or Deputies Committee meeting, because this is the office most likely to see all the paper flowing to the President and all the meeting agendas. It also has the focus and mission to staff problems from the ground up rather than in finished form. But whether these tasks are performed by NSC/Legal or elsewhere, it is essential that they be performed within the Executive Office of the President.

The essential skill of the national security lawyer at the NSC is the ability to spot issues, generate timely advice through consultation with the appropriate experts, and succinctly convey results to senior policy-makers without losing nuance. How to balance the inherent tension between substantive input and speed in each context is the art of performance. Knowing above all else how much you don't know is a keystone to success.

As an illustration of this process, during Kosovo, I attended Deputies and Principals meetings, often one or two a day. Afterwards, I would follow up with analysis alerting the National Security Advisor in more detail to legal rocks and shoals ahead. I would also ensure that agency general

counsel were aware of the issues raised relevant to their principals. On targets coming to the President for review, my critical process link was with the legal counsel to the Chairman of the Joint Chiefs, Mike Lohr, who worked in concert with the DOD general counsel. Having determined the process I thought would work best, I made sure that the National Security Advisor and the Chairman of the Joint Chiefs agreed, which ensured the full backing of the chain of command.

As the national-level military lawyer closest to the operational line, Admiral Lohr served as my primary contact, through whom I could track and review target briefs as they came to the White House from the CJCS and Secretary of Defense. This communications channel kept me ahead of, or at least even with, the operational time line, and ensured that the President, and not just the Pentagon, had the benefit of military and DOD legal expertise. It also provided for a single chain of legal communication, thereby avoiding confusion. Working together on hundreds of targets, we came to understand each other's vocabulary, tone, and expressions.

I should also point out that my earlier exposure in 1994 to Mike Lohr and Rick Rosen contributed to my judgment that a Judge Advocate should always serve in the NSC legal office. My experience was that judge advocates are terrific generalists, who are as willing to work outside their expertise as they are within it. Moreover, there was no need to explain to a judge advocate general (JAG) that work came first, every day, seven days a week. Judge advocates general understood the importance of being present when the question is asked. Decision-makers at the NSC were prepared to engage the lawyer, so long as the response was immediate. The JAGs I worked with also readily understood the importance of leaving ego at the door when coordinating (and sometimes coaxing out) agency views. At the same time, I found that military lawyers, particularly those outside of Washington, initially needed coaching on how to engage the bureaucracy both within the White House and through the interagency process. Where was the appropriate point of entry? Who could speak for an agency's legal view and when were they doing so? I sensed that the hardest adjustment was learning how much nuance to provide with advice and in what manner to provide it.

In my own case, I came to realize that perhaps my most relevant legal training had been as a Marine Corps infantry officer. Infantry officers, like other military officers, have many opportunities to make rapid decisions with incomplete information, and then be held accountable for those decisions. So, while there are lots of extremely bright lawyers, not all law-

yers are capable of making a decision on operational timelines. The Marine Corps also gives one the opportunity to practice endurance, an essential trait when the legal advice rendered at midnight must be as fresh and solid as that offered at 0800 in the morning.

B. Duties of the National Security Lawyer

It is axiomatic that the national security lawyer's duty is to guide decision-makers toward legally available options. In performing this function in a timely and meaningful manner, the lawyer provides for our physical security. In doing it faithfully, based on honest belief on the application of law, they provide for the security of our way of life, which is founded on the rule of law. The daily grind of national security legal advice, however, should not overshadow three additional and enduring responsibilities of the lawyer.

C. Process

Lawyers are not always readily accepted into the decision-making room. This reluctance reflects concerns about secrecy, delay, and "lawyer creep" (the legal version of "mission creep," whereby one legal question becomes seventeen, requiring not one lawyer but forty-three to answer). Of course, decision-makers may also fear that the lawyer may flatly say "no" to something the policy maker wants to do.

Nonetheless, lawyers are indispensable to good process and should feel a duty to uphold good process and participate in decision-making. In any given context, the pressure of the moment may encourage short-term thinking and the adoption of process shortcuts. The lawyer alone may be sufficiently detached from the policy outcome to identify the enduring institutional consequences of a particular course of action. So too, the lawyer alone may be familiar, and may feel an obligation to be familiar, with applicable written procedures. Process is substance if it means critical actors and perspectives are omitted from the discussion table.

In my experience, good process results in better decisions. As I noted, it ensures that the correct actors are in the room, with the best information as is available at that time. It avoids oversights. In a constitutional democracy, it also helps to ensure that decisions are made in accordance with law and by those actors the people elected to make those national security deci-

sions most important to our well being. Good process also establishes accountability, which in turn improves result.

Second, process is not antithetical to timely decisions, operational timelines, or to secrecy. Process must find the right balance between speed and strength, secrecy, and input. But process can always meet deadlines. There is no excuse for shortcuts. Process can be made to work faster and smarter. By example, if legal review is warranted, the attorney general alone can review a matter and, if need be, do so while sitting next to the President in the Oval Office. The problem some policy-makers have with process is not the time it takes for good process, but the prospect of disagreement, and that can take real time to resolve.

Third, process should be contextual. The legal and policy parameters for responding to terrorism are different than those for responding to a Balkan crisis. Clandestine and remote military operations against a hidden enemy will dictate different decision processes than NATO air operations against fixed targets, as will the different political and policy parameters of both situations. One has to maintain situational awareness to find the measure of process and approval that ensures law is applied in a manner that is faithful to constitutional, statutory, and executive dictates, *and* that meets operational timelines. Therefore, there will always be some tension as to whom should see what when. But, if there is no right way to lawyer, there is a "worst way," which is to exclude lawyers from the process or for the lawyer to wait to be asked.

Finally, good process is also dependent on culture, personality, and style. The President can direct legal review of his decisions, but if a National Security Adviser is not committed to such a review, it will not occur in a meaningful manner, if at all. In short, it is not just the presence of a Legal Advisor at the NSC that will prevent an Iran/Contra, it is the presence of an [Assistant to the President for] NSA who insists on legal input in the decision-making process. And, where there is a seam in the process, the lawyer must identify it.

I was fortunate to work for national security advisors and with Chairmen of the Joint Chiefs of Staff and Secretaries of Defense that understood

this. In Mr. [Samuel R.] Berger's[7] words, my duty was to ensure that in doing the right thing, the United States was doing it in the right way.

D. Educate

National security lawyers also have a duty to educate. Absent groundwork, the policy-maker may respond at the moment of crisis by seeing the law only as something that allows or does not allow the policy-maker to do what he wants. Contextual advice built on a foundation already laid will be more readily absorbed and accepted. Policy-makers will internalize the parameters of the law and better understand why the law applies the way it does. A three a.m. conference call is no time to explain for the first time the overriding principles of proportionality, necessity, and discrimination in targeting. Nor will all policy makers immediately understand the sometime incongruous application of the law of armed conflict (LOAC) without some background on the Geneva Conventions and their overriding commitment to a legal and moral imperative of ensuring that force is used in the most humane and economical manner possible. Therefore, I made a point of educating on the law of armed conflict *before* (as well as during and after) the air campaign.

Advance guidance on the law of armed conflict also helps establish lines of communication and a common vocabulary of nuance between lawyer and client before the crisis. In a larger, more layered bureaucracy than the President's national security staff, where the lawyer may be less proximate to the decision-maker at time of crisis, I imagine that the teaching process is even more important. Any policy maker who hears a good LOAC brief will be sure his or her lawyer fully participates in the targeting process. In addition, the policy maker will understand in a live situation that the lawyer is applying "hard law"—specific, well established, and sanctioned—and not kibitzing on operational matters.

I say that in part because I found that some policy makers treat international law as "soft law," and domestic, particularly criminal, law as "hard law." The law of armed conflict is, of course, both. Under 18 U.S. Code § 2441, specified war crimes committed by or against Americans violate U.S. criminal law. Moreover, whether we like it or not, the law of

7. Mr. Berger was the National Security Advisor during the Clinton Administration from 1997- 2001.

armed conflict will continue to serve as one international measure by which the United States is judged.

Today, an understanding of the legal framework of homeland security is as important as understanding the law of armed conflict. And like that law, issues involving posse comitatus are hard to explain in a "yes" or "no" sentence at three in the morning.

E. Constitution

Most importantly, lawyers must be advocates for the Constitution and not just for their clients. National security lawyers have a responsibility to teach, explain, and apply the Constitution, and turn it over to the next watch in as strong a position as they found it.

There are hard questions ahead in a time of homeland insecurity from which lawyers should not shy. Alexander Hamilton wrote in *Federalist 8*:

> Safety from external danger is the most powerful director of national conduct. . . . The violent destruction of life and property incident to war, the continual effort and alarm attendant on a state of continual danger, will compel nations the most attached to liberty to resort for repose and security to institutions which have a tendency to destroy their civilian and political rights. To be more safe, they at length become willing to run the risk of being less free.[8]

It is the national security lawyer's task to alert policymakers to this tension. To show both sides of every coin. As Justice Jackson observed of his own government service in *Youngstown*, "the tendency is strong to emphasize transient results upon policies and lose sight of enduring consequences upon the balanced structure of our Republic."[9] This means not only advising the client on what legally can be done, but also on the institutional consequences of taking those actions.

This is hardest to do when lives are at stake. But, the Constitution was not designed to fail, to safeguard our security at the expense of our freedom, or celebrate freedom at the expense of security. It is designed to

8. THE FEDERALIST NO. 8 (Alexander Hamilton) (Clinton Rossiter ed., 1961).
9. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 634 (1952).

underpin and protect us *and* our way of life. National security lawyers must let it do both.

It takes moral courage to participate fully and objectively as a lawyer: to say "yes," to say "no," and more often, something in between that guides. But, you cannot have law without courage. We may be a government of laws, but "laws are made by men, interpreted by men, and enforced by men, and in the continuous process, which we call government, there is continuous opportunity for the human will to assert itself."[10] Therefore, law depends on the morality of those who apply it. It depends on the moral courage of lawyers like you, who will raise tough questions, who dare to argue both sides of every issue, and who will insist upon being heard at the highest levels of decision-making, and ultimately, call the legal questions as they believe the Constitution dictates and not necessarily as we may want at a moment in time.

This duty should have particular resonance with military and government lawyers who have sworn to "support and defend the Constitution of the United States . . ., [and to] bear true faith and allegiance to the same."[11]

In 1916, President Woodrow Wilson was asked to speak to the graduating Naval Academy class on the eve of United States entry into World War I. Remarkably, he arrived without a prepared speech, which adds to the beauty and sincerity of his words. This is how he closed.

> I congratulate you that you are going to live your lives under the most stimulating compulsion that any man can feel, the sense, not of private duty merely, but of public duty also. And then if you perform that duty, there is a reward awaiting you which is superior to any other reward in the world. That is the affectionate remembrance of your fellow men—their honor, their affection.[12]

I can think of no more important time to be a lawyer, and in particular, a national security lawyer, like you. Every day you come to work, you provide for our physical security by clearly and quickly advising the decision-maker. And, you help to secure our way of life by upholding the rule of

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10. A. WHITNEY GRISWOLD, THE BASIS OF A RULE OF LAW, LIBERAL EDUCATION AND THE DEMOCRATIC IDEAL (Yale University Press 1959).

11. U.S. Dep't of Army, Form 71, Oath of Office—Military Personnel (July 1999).

12. Woodrow Wilson, Address to Naval Academy Graduating Class (1916), *reprinted in* LEND ME YOUR EARS: GREAT SPEECHES IN HISTORY (William Safire ed., 1997).

law with good process, spotting the enduring consequences of what we do, and facing squarely the sometime tension between security and liberty raised in *Federalist Number 8*. The national security lawyers who are true to this duty should never doubt their role or their worth, and while they may not always garner affection, they will always have the honor of having borne true faith and allegiance to the Constitution. There is no higher calling.

THE WILD BLUE: THE MEN AND BOYS WHO FLEW THE B-24s OVER GERMANY[1]

REVIEWED BY MAJOR MICHAEL J. MCCORMICK[2]

The word "plagiarism" derives from Latin roots: "plagiarius," an abductor, and "plagiare," to steal. The expropriation of another author's text, and the presentation of it as one's own, constitutes plagiarism and is a serious violation of the ethics of scholarship. It undermines the credibility of historical inquiry. In addition to the harm that plagiarism does to the pursuit of truth, it can also be an offense against the literary rights of the original author and the property rights of the copyright owner . . . . The real penalty for plagiarism is the abhorrence of the community of scholars.[3]

I. Introduction

2002 did not start well for Stephen Ambrose. While enjoying the success of his latest best seller, *The Wild Blue*, an article in *The Weekly Standard* raised charges of plagiarism in the work.[4] The article showed that Ambrose lifted quotations from Thomas Childers' *Wings of Morning: The Story of the Last American Bomber Shot Down over Germany in World War II*,[5] without properly footnoting the material (although Ambrose did

1. STEPHEN AMBROSE, THE WILD BLUE: THE MEN AND BOYS WHO FLEW THE B-24S OVER GERMANY (2001).

2. United States Air Force. Written while assigned as a student, 50th Judge Advocate Officer Graduate Course, The Judge Advocate General's School, United States Army, Charlottesville, Virginia.

3. Organization of American Historians, *Statement on Standards of Professional Conduct – Statement on Plagiarism*, *at* http://www.oah.org/pubs/nl/ (last visited Mar. 6, 2002).

4. Fred Barnes, *Stephen Ambrose, Copycat; The Latest Work of a Bestselling Historian Isn't All His*, WKLY. STANDARD, Jan. 14, 2002, at 27.

5. THOMAS CHILDERS, WINGS OF MORNING: THE STORY OF THE LAST AMERICAN BOMBER SHOT DOWN OVER GERMANY IN WORLD WAR II (1995).

acknowledge the work in the bibliography and several footnotes).[6] *The Weekly Standard* correctly pointed out:

> Sentences in Ambrose's book are identical to sentences in Childers's. Key phrases from *Wings of Morning*, such as "glittering like mica" and "up, up, up," are repeated verbatim in *The Wild Blue*. None of these—the passages, sentences, phrases—is put in quotation marks and ascribed to Childers. The only attribution Childers gets in *The Wild Blue* is a mention in the bibliography and four footnotes. And the footnotes give no indication that an entire passage has been lifted with only a few alterations from *Wings of Morning* or that a Childers' sentence has been copied word-for-word.[7]

Confronted with the evidence, Ambrose quickly admitted to guilt by negligence.[8] Despite this honorable admission of his mistake, the damage had been done to Ambrose's reputation.[9] As one fellow historian noted, "This would be, for me as a teacher, unacceptable in a student, much less in a professional historian. It's sad because he is a historian whose work I have often used and admired."[10] The question now is should the student of military leadership and history read *The Wild Blue* in spite of the plagiarism?

Plagiarism is a serious charge. It completely cuts the author's credibility. In the academic world, Ambrose may have suffered a fatal blow to his credibility. Ambrose, however, had been moving away from the academic world for some time. His recent works[11] are entertaining and moving, but have not contributed any new theories or profiles to the history of World War II. No one can argue that Ambrose knows how to capture the stories of the average troop in World War II. Because of this, his works have been very successful with the general public. Thus, setting aside the

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6. Barnes, *supra* note 4, at 27.

7. *Id.*

8. David D. Kirkpatrick, *Author Admits He Lifted Lines From '95 Book*, N.Y. TIMES, Jan. 6, 2002, at 1-22.

9. Ambrose has taught at the University of New Orleans, Rutgers, Kansas State, Naval War College, and a number of European schools. He has frequently written on military history. He was the official biographer of Dwight D. Eisenhower as well as the author of the best selling work *Undaunted Courage*, a history of the Lewis and Clark expedition.

10. Northwestern University Professor Michael S. Sherry, *quoted in* David D. Kirkpatrick, *As Historian's Fame Grows, So Do Questions on Methods*, N.Y. Times, Jan. 11, 2002, at A1.

plagiarism issue, if that is even possible, this review turns to the question of whether *The Wild Blue* is worthy of the reader's time.

II. The Wild Blue

The Wild Blue begins with the following query:

> *The Army Air Corps needed thousands of pilots, and tens of thousands of crewmembers, to fly the B-24s. It needed to gather and train them and supply them and service the planes from a country in which only a relatively small number of men knew anything at all about how to fly even a single-engine plane, or fix it. From whence came such men?*[12]

One of the young men that came forth to fly the B-24 was George McGovern, later the senator from South Dakota and unsuccessful candidate for president in 1972. In this, his latest book on World War II,[13] Ambrose elicits the stories of the young men, such as McGovern, who made up the fighting force who in Ambrose's words "saved the world."[14] The stories involve the background, training, and combat experiences of those who flew the B-24 Liberator Bomber in Europe during World War II. While *The Wild Blue* does not contribute anything new to the literature on World War II or, more specifically, the aerial campaigns, it is an enjoyable and interesting book that captures the story of the young men who grew into warriors and leaders.

The Wild Blue has an interesting genesis. This book arose out of McGovern urging his long-time friend Ambrose to tell the story of the not-so-well-known B-24 Liberator and the role it played in the European Theater of World War II. While this is not a book about George McGovern, his experiences as a B-24 pilot are the book's linchpin. The friendship between Ambrose and McGovern was the bridge between McGovern's

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11. *The Wild Blue* is the final volume of a trilogy by Ambrose in which he describes the experiences of the ordinary citizen-soldier that fought in World War II. AMBROSE, *supra* note 1; STEPHEN AMBROSE, CITIZEN SOLDIERS: THE U.S. ARMY FROM THE NORMANDY BEACHES TO THE BULGE TO THE SURRENDER OF GERMANY, JUNE 7, 1944-MAY 7, 1945 (1997); STEPHEN AMBROSE, BAND OF BROTHERS: E COMPANY, 506th REGIMENT, 101ST AIRBORNE FROM NORMANDY TO HITLER'S EAGLE'S NEST (1992).

12. AMBROSE, *supra* note 1, at 262.

13. *See supra* note 11.

14. AMBROSE, *supra* note 1, at 262.

wartime experiences and Ambrose's desire to tell the story of the junior ranks that actually operated and maintained the aircraft.

Ambrose's admiration of McGovern and the men of his generation who fought the war comes through unabashedly in the book. Unfortunately, this may be the book's weak point. Ambrose provides almost no critical analysis of their missions, although he briefly discusses the issue of the accuracy of bombing attacks. He devotes only a few pages to whether the Army Air Corps actually succeeded in the strategic bombing attacks, and whether the attacks actually resulted in needless deaths of civilians or the destruction of a countless number of historic buildings and civilian homes.[15] Ambrose dismisses any criticism of air power as mere inter-service rivalry.[16] His answer to the critics is a simple conclusion: The Allies won the war, and a big part of the war was the bombing campaigns. Thus, the bombing campaign was a success.[17] Any reader expecting lengthy analysis of whether the bombing campaigns were successful will come away disappointed.

The Wild Blue focuses on the B-24's role in the European front, where McGovern and others flew the B-24 for the Fifteenth Air Force. At that point in the war in 1944, the Allies had occupied southern Italy, and there the Army Air Corps stood up the Fifteenth Air Force. Ambrose briefly describes the origin and background of the Fifteenth Air Force, but unfortunately, it is only a superficial examination of this major flying combat organization.

This is disappointing since Ambrose entitles an entire chapter "The Fifteenth Air Force." The reader receives a brief introduction to the advocacy of air power and the main reasons the Army Air Corps created this second major air corps unit in addition to the Eighth Air Force. Beyond only the simplest survey, however, the reader does not take much away from the chapter, either on the leadership of the unit or its overall mission. Therefore, the chapter only detracts from Ambrose's main purpose in describing the men who flew the B-24, without lending any true insight into the Fifteenth Air Force.

The chapter entitled "The Tuskegee Airmen Fly Cover" equals the scant attention paid to the Fifteenth Air Force. The story of the fabled 99th

15. *Id*. at 247.
16. *Id*. at 246-47.
17. *Id*. at 251.

Fighter Squadron manned by African Americans has rightly received great attention over the last ten years. Their war record was exemplary even without factoring in the barriers they had to overcome. While these fascinating warriors, who overcame so much, deserve an entire chapter in *The Wild Blue*, Ambrose, for unknown reasons, goes on to devote only three pages of the chapter to their story. Instead, the Tuskegee Airmen story intersects with the B-24 story because the Tuskegee Airmen successfully flew cover for B-24 crews such as McGovern's. Naming the chapter after the famed Tuskegee Airmen is misleading: it only promises the reader something that Ambrose does not deliver.

The reader also will not find much analysis devoted to whether the extraordinary destruction caused by the bombing was proportional to any military success. McGovern's crew and others assigned to the Fifteenth Air Force dropped 13,469 tons of bombs at just one target: the oil refineries in Ploesti, Romania.[18] The cost of these bombing runs was high; the Fifteenth Air Force lost 318 bombers in July 1944 alone.[19] Ambrose just touches on the high cost of these missions. The destruction on the ground due to inaccuracy of free-falling bombs was equally devastating. Ambrose briefly mentions this destruction, [20] but never engages in a meaningful analysis of whether the bombing's collateral damage was worth it for the target's successful destruction. Like the chapters on the Fifteenth Air Force and the Tuskegee Airmen, if Ambrose raises the topic, he owes the reader more than a cursory discussion.

The lack of analysis on bombing accuracy and extensive collateral damage as well as the curt examinations of the Fifteenth Air Force and the Tuskegee Airmen will disappoint any reader wanting more academic substance. Multiple books and articles have been written on all of these topics.[21] It is unclear whether Ambrose deliberately gave the topics little

18. *Id*. at 121.

19. *Id*.

20. *Id*. at 247.

21. *See generally* THE AIR FORCES IN WORLD WAR II (Wesley F. Craven & James L. Cate eds., 1958); TUSKEGEE AIRMEN, SELECTED REFERENCES (Dana Simpson ed., 1993) (bibliography on file with the Air University Library at Maxwell Air Force Base, Alabama), *available at* http://www.au.af.mil/au/au/bibs/bib97.htm; EUROPE: COALITION AIR POWER STRATEGY IN WORLD WAR II (Janet Seymour & Evette Pearson eds., 1998) (bibliography on file with the Air University Library at Maxwell Air Force Base, Alabama), *available at* http://www.au.af.mil/au/au/bibs/bib97.htm; LAW OF ARMED CONFLICT: AERIAL BOMBING OF CIVILIANS (Melinda M. Mosely ed., 2000) (bibliography on file with the Air University Library at Maxwell Air Force Base, Alabama), *available at* http://www.au.af.mil/au/au/bibs/bib97.htm.

discussion or if he felt only a brief discussion was necessary to complete the background of the World War II European Theater. A better approach would have been to maintain the book's primary focus on describing the young men who piloted and crewed the B-24s. Wandering summarily into the other topics detracts from the book and promises more than Ambrose delivers.

Despite the shortcomings, Ambrose delivers vivid portraits of the men who flew the B-24. While not a historical treatise, *The Wild Blue* is a captivating account of those who brought the fight to the enemy from the air. "Where They Came From" is the appropriately titled first chapter of *The Wild Blue*. Ambrose logically begins his account of the B-24 crewmembers by describing their backgrounds. As he points out, the crewmembers came from diverse backgrounds. Some came from big cities; others came from remote rural areas. Some were relatively well off despite the Depression, while others were literally dirt poor. Ambrose's focus of the book, George McGovern, was somewhere in the middle. He grew up in a small town in South Dakota, the son of a minister. Ambrose's no-nonsense writing style cuts directly to the essence of these young men.

The Wild Blue makes effective use of interviews with numerous veterans. As these veterans who led the battle on the ground, in the sea, and in the air begin to pass away, the use of primary sources such as these interviews is invaluable to students of history. Perhaps more importantly, there are few authors better than Ambrose who speak to these veterans. As Thomas Childers, the author whom Ambrose plagiarized noted, "He really did a lot to shift the focus away from the high commands . . . . Veterans love him."[22] What is amazing to the reader of Ambrose's works is that he was not a veteran of World War II.

The stories found in *The Wild Blue* are fascinating. One of the best accounts in the book is of the emergency landing that McGovern made at the island of Vis, located in the Adriatic Sea near the Dalmation coast. The island had a 2200-foot runway, perfect for fighters but nowhere close to the required 5000 feet needed for B-24s. With a damaged engine and low fuel, McGovern nursed the B-24 to Vis. Ambrose perfectly describes the tension as the crew, beginning their approach, sighted "carcasses of half a dozen bombers beyond the field."[23] McGovern made the perfect landing

22. Barnes, *supra* note 4, at 28.
23. AMBROSE, *supra* note 1, at 195.

and the crew lived to see another day. For his actions, the Army Air Corps awarded him the Distinguished Flying Cross.[24]

This and other harrowing accounts of B-24 crews provide vivid examples of how ordinary men were trained to deal successfully with extraordinary situations. While Ambrose may not have set out specifically to write a book on leadership, the stories of the B-24 crews provide excellent leadership examples. Literally putting their lives on the line every time they went into the air, each member of the crew worked closely together to ensure mission success. Ambrose correctly points out that the leadership of young men like McGovern was instrumental in ensuring that the crews accomplished their mission and survived the dangers they faced. Any reader interested in the art of leadership would benefit from reading *The Wild Blue*.

One tends to forget that McGovern, like many of the B-24 pilots, was only twenty-two years old. Ambrose does a good job of periodically reminding the reader of these warriors' youth. He also does an excellent job of organizing the book from the pilots' early days of flight training, to training on the B-24, and finally into actual combat. The organization helps the reader understand the journey of these young men who undertook an incredibly difficult task and prevailed, becoming warriors and leaders in the process.

III. Conclusion

In an interview with the *New York Times*, Ambrose defended his mistake by saying: "I tell stories. I don't discuss my documents. I discuss the story. It almost gets to the point where [. . .] how much is the reader going to take? I am not writing a Ph.D. dissertation."[25] This explanation in no way excuses what Ambrose did; however, readers should not avoid *The Wild Blue* simply because of the underlying plagiarism. Instead, students of World War II history and leadership should strive to read the accounts of veterans who were there, those that came together and truly saved the world. As these veterans pass into history, any book that vividly captures their stories is valuable despite its academic shortcomings. Ambrose's plagiarism, intentional or not, does not diminish the value of their stories.

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24. *Id*. at 196.

25. Kirkpatrick, *supra* note 10, at A1.

THE PRICE OF VIGILANCE: ATTACKS ON AMERICAN SURVEILLANCE FLIGHTS[1]

REVIEWED BY MAJOR JEFFREY A. RENSHAW[2]

> *If, begrudging the outlay of ranks, emoluments, and a hundred pieces of gold, a commander does not know the enemy's situation, his is the height of inhumanity. Such a person is no man's commander, no ruler's counselor, and no master of victory.*
>
> - Sun Tzu[3]

In *The Price of Vigilance*, authors Larry Tart and Robert Keefe discuss the crucial Cold War mission of U.S. Air Force and Navy airborne intelligence-gathering reconnaissance aircraft: to keep abreast of Soviet military capabilities and intentions and to avert a surprise attack. No less a seminal military philosopher than Sun-Tzu recognized the importance of intelligence, which is no doubt why the authors prefaced their book with the quote above. *The Price of Vigilance* details how American Cold Warriors successfully met this all-important mission, satisfying Sun-Tzu's admonishment to spare no expense in obtaining information.

The authors may also have chosen the Sun-Tzu quote to criticize a commander's ill-advised frugality—begrudging the outlay of "gold," the military budget—in training, outfitting and providing recognition for his troops. The quote's philosophy can be extended to support one of the authors' main premises of the book. Tart and Keefe argue that these airborne recon crews successfully performed their vital mission, but they did so constrained by poor training and planning and by scant, if any, official recognition of their efforts.

The authors assert that poor training and planning, as well as faulty equipment, led to the 1958 Soviet shoot-down of an Air Force reconnaissance aircraft. The book's centerpiece is a detailed discussion and analysis

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1. LARRY TART & ROBERT KEEFE, THE PRICE OF VIGILANCE, ATTACKS ON AMERICAN SURVEILLANCE FLIGHTS (2001).

2. Judge Advocate, United States Air Force. Written while assigned as a student, 50th Judge Advocate Officer Graduate Course, The Judge Advocate General's School, United States Army, Charlottesville, Virginia.

3. TART & KEEFE, *supra* note 1, at vii.

of this particular shoot-down. The authors deplore the fact that the flight's dead crewmembers and their families did not receive official recognition until the late 1990s. The authors themselves were instrumental in seeing that the Air Force finally gave this long-overdue recognition. Did the authors also offer the Sun-Tzu quote, therefore, as a stab at the "inhumane" commander who does not properly train, equip, and then recognize his troops? Probably so.

Two former Air Force members, Larry Tart and Robert Keefe, co-authored *The Price of Vigilance*. Both were trained as Russian linguists and airborne voice intercept operators, and they served aboard Air Force reconnaissance aircraft during the Cold War. Both are personally invested in the subject matter of the book; as discussed herein, this has its pros and cons.

As noted above, the authors focus on the Soviet shoot-down over Soviet Armenia of Air Force C-130 60528 on 2 September 1958, in which all seventeen crewmen died. The Air Force's post-shoot-down failure to provide details of the incident to the lost crewmen's families is well documented. For many years, some family members harbored hopes that their loved ones were still alive and held in captivity in the Soviet Union. The authors write:

> Forty years ago, I felt it my duty to pay my condolences to the families of the men who died. Bureaucratic, largely senseless, security considerations prevented me and my friends from taking that simple human step, which seemed so natural, so necessary to me and to the others. This book has finally given me that chance. Moreover, after nearly half a century, I feel that I finally have a reasonable understanding of just what happened and why it happened.[4]

The reader need go no further to find out why Tart and Keefe wrote the book. At its best, *The Price of Vigilance* satisfies the authors' main intent, to identify the critical mission U.S. airborne reconnaissance crews performed during the Cold War, to highlight the inherent dangerousness of those missions, and to give credit where credit is due, specifically to the fallen crewmembers of 60528. In doing this, *The Price of Vigilance* ably

4. *Id.* at xiii.

discusses the crews' vitally important Cold War intelligence-gathering mission.

The authors explain that U.S. Cold War leadership feared a Soviet nuclear attack, necessitating reconnaissance missions probing Soviet air defenses. Faced with the threat of a Soviet nuclear attack, the Strategic Air Command required accurate air order of battle (AOB) data and electronic order of battle (EOB) data to locate strategic targets and develop air operations plans.[5] These AOB and EOB were "essential elements of information for strategic air combat planners. . . . Signals intelligence was often the only available source for that critical data on the enemy's military forces."[6] The authors explain that "signals intelligence" or "SIGINT" refers collectively to the interception and exploitation of enemy communications and enemy radars.

The reader might also expect *The Price of Vigilance* to offer suggestions on how to improve the safety of reconnaissance flights, but none is forthcoming. The book does, however, delve into a discussion of the 1 April 2001 incident between a U.S. Navy P-3 reconnaissance aircraft and a Chinese F-8 fighter. In his "Author's Note," Mr. Tart admits that the book, as originally intended, had a "tight focus" on the 1958 shoot-down and the loss of the seventeen crewmen. But the U.S.-China incident convinced him of the need to expand that tight focus and delve further "into a much broader consideration of the dangers of aerial reconnaissance throughout the Cold War."[7] He states:

> There have always been inherent dangers associated with manned airborne reconnaissance missions—yet the missions were and still are necessary. . . . From the beginning of the Cold War, one of the primary results of aerial reconnaissance was to allow the [United States] to hold down military spending because the country has a very accurate idea of potential enemies' ability to carry out hostile actions, and, simultaneously, that knowledge allowed the United States to avoid other potential Pearl Harbors. . . . Airborne reconnaissance, working in tandem with surveillance satellites, is still necessary to forewarn

5. "Air order of battle data" or "AOB" is the number and types of aircraft by unit and deployment base; "electronic order of battle data" or "EOB" is the number and types of radars and other emitters in use and where they are deployed. *See id.* at 143.

6. *Id.*

7. *Id.* at xv.

> America of the military capabilities and intents of its adversaries.[8]

The author's point is well taken. The 11 September 2001 *Washington Times* reported an incident occurring the week before over the Pacific Ocean, in which a Russian MiG-31 interceptor pilot "thumped"[9] and "locked-on" a U.S. Navy P-3 reconnaissance aircraft.[10]

This most recent incident, coupled with the 1 April 2001 U.S.-China incident, strongly supports the author's conclusion that "today's surveillance flights are every bit as perilous as the recon missions of our airborne recon pioneers more than fifty years ago."[11]

The Price of Vigilance goes beyond a discussion of the danger of Cold War reconnaissance missions, and it attempts a detailed discussion of the 1 April 2001 U.S.-China incident. This is a mistake. The authors' stated aim, to specifically pay homage to the crew of 60528, is noble enough and worthy of a book. Further, the book's expanded consideration of Cold War aerial reconnaissance dangers is thorough. Those messages are diluted, however, by the tacked-on discussion of the U.S.-China incident,[12] contained in the first chapter, which is numbered differently from the rest of the book.[13] No doubt, the authors simply added this introductory chapter as an afterthought.

That is not to say that the introductory chapter does not contain a thorough summary of what happened, including the U.S. and Chinese versions of the incident. But the chapter's content is muddled, including a hodge-

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8. *Id.* at xvi.

9. "[A] high speed interception from the rear and above (or below) at near Mach is extremely routine and is called 'thumping.' As the fighter passes the heavier intercept aircraft, the fighter pilot pulls up abruptly, causing shock waves to beat upon the bigger plane." *Id.* at li. *See supra* note 13 (explaining the book's unusual pagination).

10. "One alarming sign of the Russian intercept was a radio message sent by one MiG pilot to his base stating his fire-control radar had 'locked-on' to the U.S. surveillance plane, U.S. intelligence officials said. A radar 'lock' is a pilot's final step before firing a guided missile." Bill Gertz, *Russian Warplanes Harass U.S. Craft over Pacific*, WASH. TIMES, Sept. 11, 2001, at A1.

11. TART & KEEFE, *supra* note 1, at xvi.

12. The first edition of the book is dated June 2001, and indeed, both authors' prefatory notes predate the 1 April 2001 U.S.-China incident.

13. Chapter 1, "Introduction: U.S.-Chinese Air Incidents," is numbered pages xix-lxxxi. The remainder of the book—chapters 2-12, Epilogue, Appendices A-G, and the Index—is numbered pages 1-566.

podge of general historical discussions on the rise of the Chinese communist government in 1949, and U.S.-China Cold War relations. The chapter also contains a lengthy discussion of several other U.S-Chinese incidents occurring in the 1950s that serve the authors' purpose in showing "the inherent dangers involved in both airborne reconnaissance and search and rescue," and illustrating "the tenacious determination of the Chinese [Peoples Liberation Army] to defend China's territorial waters."[14] There are more dissimilarities than similarities, however, between these Cold War incidents and the most recent U.S.-China incident. Nevertheless, the discussion serves to inform the American public of the heretofore unknown sacrifices made by American reconnaissance aircrews in non-war confrontations during the Cold War, a goal of the authors.

In discussing the inherent danger of recon missions, the authors interestingly note that U.S. Navy F-4 and F-14 pilots often reveled in tales of "how close, how long, and how risky they could get during intercept missions." The authors characterize this as just the "common environment in the escort world."[15] They note that, during the Cold War, more than 200 U.S. military "silent warriors" who were involved in airborne intelligence gathering missions became KIA (killed in action) or MIA (missing in action) statistics, highlighting the dangers that surveillance crews routinely faced.[16] Because even U.S. fighter pilots acknowledge what can be colloquially described as a high stakes, high altitude game of "chicken," this may explain why the authors offer no safety suggestions for airborne recon flights; there are none to offer.

Regarding the 1 April 2001 U.S.-China incident, the authors conclude that Wang Wei, a reputed "show-off" Chinese pilot with a history of dangerous flying, caused the mid-air collision by bumping into the U.S. aircraft. Not surprisingly, the Chinese version holds that the American plane veered at a wide angle toward the Chinese fighter and rammed its tail. *The Price of Vigilance*, however, adds no more to the substantive discussion of the incident than could be found in the American print media. The introductory chapter on the incident does not provide source information for some of the authors' conclusions (in contrast to the remainder of the book), and it fails to adequately explain the significance of the "Dutch P-30 Orion

14. TART & KEEFE, *supra* note 1, at lxxii.
15. *Id.* at li.
16. *Id.* at lv.

Group," which apparently did an accident reconstruction supporting the American version of the collision.[17]

The authors would have done well by either skipping entirely the discussion of this U.S.-China incident, or delaying the book's publication until it thoroughly discussed the incident's ramifications. A cynic might say they added the chapter to make their book more attractive to the book-buying public. The hastily written discussion results in some internal inconsistencies, and the authors fail to hammer home obvious, key points. For example, the book states that while China focuses its SIGINT activities primarily within "its neighborhood," it also "snoops" on the United States.[18] Later in the chapter, however, the authors state that "[t]he extent to which PLA ships and aircraft shadow U.S. operations in the Pacific appears to be minimal."[19]

Earlier in the same chapter, the authors point out the distinct possibility that the Chinese will be able to "reverse-engineer" the Navy P-3 and therefore incorporate its technology into their own, giving the Chinese greater intelligence-gathering capability. They further speculate that since the late 1980s, China has jointly operated SIGINT ground stations, with the U.S. Central Intelligence Agency's (CIA) Office of SIGINT Operations, which monitor Soviet missile tests and space launches. "[A]ny signals intelligence collection technology provided by the CIA for those sites has in all probability already found its way into other Chinese intelligence collection systems."[20] This seems a rather obvious point. It is unlikely that one arm of the Chinese intelligence community did the "ethical thing" and protected confidential U.S. SIGINT technology from other arms of the Chinese intelligence community. In this instance, the U.S. can hardly expect China to institute a firewall, that is, a "Chinese wall"!

Yet the authors fail to make the point that, even if Chinese intelligence monitoring of the United States has been "minimal" in the past, it seems likely that the technology gained from the reverse-engineering of the Navy P-3, as well as the technology they undoubtedly picked up from joint oper-

17. The book states "A Dutch 'P-3 Orion Research Group' completed an analysis of the collision," but it provides no further explanation as to who or what this "research group" entailed. *See id.* at xlvii.

18. *Id.* at lviii.

19. *Id.* at lxi.

20. *Id.* at lxii.

ations with the CIA, will enable the Chinese to exert a much greater intelligence-gathering capability, which the United States needs to counter.

Despite the introductory chapter's favorable points, the book's discussion of the 1 April 2001 U.S.-Chinese incident distracts the reader from its "centerpiece," the 2 September 1958 U.S.-Soviet incident. Here the book is at its best, providing an extensive, well-documented discussion of this ultimately tragic mission, beginning in Chapter 1.

Flying out of Incirlik Air Base, Turkey, the American crew's primary mission was to monitor Soviet ground communications involving new surface-to-surface missiles. For reasons definitively unknown, the aircraft inadvertently strayed into Soviet territory (Armenia). Four Soviet fighter planes intercepted 60528 the moment it crossed the Soviet border. The authors do an excellent job of piecing together accounts of the incident from both American and Soviet sources, which until the 1990s were largely classified and unavailable. The book chillingly describes the "deadly encounter":

> The first pair of MiGs . . . suddenly materialized out of the blinding glare of the afternoon sunlight before the American crew noticed its mistake. The Yerevan flight leader . . . made a quick pass, opening fire on the American plane, and the C-130, instead of obeying that command to land, banked sharply to the right, diving and turning west. Two minutes later, at 1:09, the second pair of MiGs . . . had been vectored into the interception. Making sure that they stayed on the Soviet side of the border—"I can see the fence"—the Soviets then began their kill.[21]

The authors pejoratively describe the Soviet attack as "sadistic," "utterly gratuitous," and as a "one-sided dog fight."[22]

After discussing other attacks, Cold War aerial reconnaissance in general, and the development of U.S. airborne communications intelligence reconnaissance in the 1940s and 1950s, Chapters 2 through 5 shift the focus back to the shoot-down of 60528. Why did it inadvertently fly into Soviet territory? While the authors call the Soviet shoot-down "sadistic," readers also learn that Soviet military policy dictated strict defense of state borders. Pilots had orders to force intruders to land at a Soviet airfield;

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21. *Id.* at 10.
22. *Id.* at 11.

failing that, they were ordered to shoot down the intruder. "The U.S. reconnaissance pilot had orders to turn away from enemy territory if attacked, and to avoid landing at an enemy airfield at all costs. Two such differing command philosophies were sure to result in tragic clashes."[23] In fairness to the Soviets, the authors admit numerous intentional U.S. intelligence-gathering overflights of their territory, leading to what Premier Khrushchev described as Soviet paranoia of an all-out American attack. This no doubt led to the Soviets' aggressive policy when their pilots were able to intercept intruding aircraft, whether flying inadvertently into their territory or not.

The authors' criticisms do not end with the Soviets, however. They conclude from their extensive research of the shoot-down that several factors contributed to the American plane's unintentional overflight, including poor training characterized as a "kick the tires and fly" mentality, and faulty navigation and radar equipment. The book discusses in detail the practice of dividing crews on these recon planes. The "front-enders" were the air crew who flew the plane, while the "back-enders" were the recon specialists. These two crews forged an uncomfortable relationship on the ground and in the air. The front-enders did not know the mission of the back-enders. Such unnecessary "security compartmentalization," according to the authors, contributed to the shoot-down.

The authors heap further strong criticism upon the Air Force for its post-shoot-down handling of the incident. The Air Force had monitored the Soviet MiG pilots' voice communications during the shoot-down and therefore knew it occurred in Soviet territory. Not wanting the Soviets to learn that it had the capability to monitor their voice communications, the U.S. conducted a sham search for the plane in Turkey. The Air Force wanted to publicly maintain the fiction that the flight had a non-intelligence-gathering mission. Also, the eleven recon specialists killed in the shoot-down were retroactively re-assigned to the flying crew's squadron, obscuring their identity and denying the other members of their squadron the "opportunity to honor their fallen brothers, or to console the wives. It created a bitterness in the men that has lasted to this day."[24]

Author Keefe was one of those squadron members denied the chance to honor and console; hence, his personal animus. He calls this purging of the names "unconscionable." The authors call the Air Force's "public lies,

23. *Id.* at 118.
24. *Id.* at 297.

. . . surreptitious transfer of the dead men to another outfit, the total lack of information, the sequestration and then secret removal of the wives from Germany" as a "violation of trust" between the men and their leaders who had "insufficient regard for 'what is right.'"[25]

The tone of the book seems to cast the crew of 60528 as unwitting pawns in a cat and mouse espionage game between East and West. The United States and the Soviets each surely knew the other's capabilities. Why could they not put aside these concerns and provide simple humanity to the families of the fallen crewmembers? The Soviets turned over the remains of six aircrew members who died in the crash, but stated at the time that they did not know what happened to the other eleven crewmembers (the "back-enders."). For several years there was U.S. speculation as to whether the eleven were alive and in Soviet captivity. It turns out they were not; the entire crew was killed in the plane crash.

Readers may begrudge the authors' use of the word "pawn," which unwittingly does a disservice to the memory of their fallen comrades. These seventeen brave crewmembers were not "pawns" caught between two equally evil, or at the very least, indifferent, superpowers. Rather, they were American warriors. Silent warriors. The authors point out, but do not stress, the 306 U.S. intercepts of Soviet planes over U.S. airspace between 1961 and 1991, all occurring without one shoot-down. The authors could have given some credit to the United States for this fact without resorting to jingoism.

Because the authors do not acknowledge that the United States tried to do the right thing, their pejorative attacks on U.S. treatment of the families after the shoot-down seem largely unwarranted. "Security guidelines forbade releasing any meaningful details regarding reconnaissance missions, leaving family members feeling abandoned, frustrated, and often bitter toward their government."[26] The authors fail to convince the reader that this sad but true outcome was anything but unavoidable. To the authors' credit, however, they helped rectify any injustice to the crew and their families by their efforts in establishing the National Vigilance Park

25. *Id.* at 299.
26. *Id.* at 117.

and Aerial Reconnaissance Memorial at Fort Meade, Maryland, which the book details.

Readers will enjoy *The Price of Vigilance* if they are interested in a detailed discussion of the development of the U.S. airborne reconnaissance program. The book will also satisfy readers seeking an exhaustive examination of the unfortunate 60528 crew, the 2 September 1958 shoot-down of their aircraft, and the uncertain aftermath for their families. On these topics, Tart and Keefe's well-researched work provides valuable insight.

RISE TO REBELLION[1]

REVIEWED BY MAJOR RICHARD V. MEYER[2]

> *That we know so much about these characters today is a testament to their accomplishments, their extraordinary achievements, and, yes, their astounding heroism.*[3]

In his latest work, *Rise to Rebellion* (*Rebellion)*, Jeff Shaara reintroduces us to the most pivotal men in our nation's history. Despite the abundance of existing literature on the American Revolution, Shaara uses a new and relevant approach to re-tell a familiar tale.

Jeff Shaara is a proven writer in the historical novel genre. With the bestsellers *Gods and Generals*, *The Last Full Measure*, and *Gone for Soldiers*, Jeff has shown his ability to mirror the incredibly successful style of his father, Michael Shaara. Both writers bring humanity to historic personages through dialogue and colorful background. Unlike simple historic texts, the reader of a Shaara novel can understand the emotions behind the making of critical decisions, not just their results.

The books of both father and son are not typical novels. Each bases its work on extensive research into the events and characters portrayed. The vast majority of each work contains the same recitation of historical facts found in non-fiction works. Where they differ, however, is in providing the inner thoughts and dialogue of the characters. These ideas do not originate in the imagination of the author, but rather through a more deductive process. Both authors gather documents written about or by each historical figure and then use them to develop the "characters" in the novel. Dialogue comes from what the authors believe the characters most likely would have said or felt in the given situation. Additionally, they add names and personalities to figures that are otherwise only remembered as a statis-

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1. JEFF SHAARA, RISE TO REBELLION (2001).

2. United States Army. Written while assigned as a student, 50th Judge Advocate Officer Graduate Course, The Judge Advocate General's School, United States Army, Charlottesville, Virginia.

3. SHAARA, *supra* note 1, at viii.

tic. An excellent example of this is the character of Private Hugh White in *Rise to Rebellion*.

In the opening scene of *Rebellion*, we meet Private White, a British Regular standing sentry duty at the Boston Custom House on 5 March 1770 in the face of colonial protests. Shaara goes beyond the limitations of non-fiction by detailing the soldier's thoughts.[4] By doing so, the reader can better understand the profound confusion of this young man. The passage also shows how little the profession at arms has changed in the last two centuries. Then, like now, the peacekeeping soldier feels daunted by a mission that is totally alien to his war-fighter training. As Shaara describes the scene, you can feel Private White's fear mount as the locals become more and more unruly. You can experience the unasked question that must have been pounding through the soldier's brain: "Why me?" White is never mentioned after the first chapter, and yet the reader remembers the fear and confusion of the British soldier and incorporates it into the events that follow. Private White is the first of many well-developed characters that Shaara introduces to the reader. With White, Shaara does an excellent job of convincing the reader to always remember the effects on the pawns when we follow the actions of the power brokers throughout the rest of the book.

History buffs will recognize the date above as the night of the famous Boston Massacre, the night British troops fired upon colonial protestors. Shaara, like many historians, identifies this event as the catalyst that started the snowball rolling down the path to all-out rebellion. He shows, as many suspect, this as a staged event, planned and carried out by radicals seeking exactly this type of catalyst. Second, he uses the event to introduce the most prevailing theme of the book, John Adams's love of the law and search for justice.

In the second chapter we meet Adams, a colonial lawyer still relatively dedicated to the British crown. He witnesses the aftermath of the massacre, and having no political agenda, feels only a great sadness at the tragedy. Despite his close personal ties to the radicals (his cousin Sam Adams is a ringleader), Adams makes the difficult and unpopular choice to defend the commander of the British[5] charged with ordering his soldiers to fire on unarmed civilians without provocation. In a courtroom drama, despite the perjury of several government witnesses supporting the

4. *Id.* at 4.
5. Captain Thomas Preston.

charges, Adams is able to successfully defend his client by finding an honest witness from among the radicals.[6] This is an example of Shaara's dedication to account historic events accurately. The testimony of the witnesses, including the critical defense witness, Richard Palmes, is almost verbatim from the official court transcripts.[7] Shaara uses this case to solidly introduce the character of Adams so that the reader can watch as Adams is slowly transformed from pacifist and semi-loyalist to raging revolutionary by his quest for justice.

Shaara may be the first author to effectively show the critical role of the legal system in the fermentation of the colonial rebellion. After Adams's client is acquitted, Shaara moves to June 1772 for the next critical legal event, the burning of the schooner *Gaspee* by Connecticut colonists.

The burning of the *Gaspee* was a minor incident but for the over-reaction of the British government. Ignoring the colonial judicial system, the crown sent English investigators to find the perpetrators and bring them to England for trial. This investigation failed, as Shaara implies any outside investigation would in this situation. Rather than a search for truth and justice, the investigation was perceived as a "colonials versus intruders" confrontation,[8] and thus colonial witnesses would not come forward. Shaara explains, but does not justify, the acts of the colonists, and even implies that they would probably have received just punishment at the hands of other colonists. When the British reacted to the failed *Gaspee* investigation by pulling control of the colonial judiciary back to the crown, Shaara portrays Adams as filled with righteous indignation. The reader can understand Adams's fury when the American judicial system is punished for the *Gaspee* incident after never being given the opportunity to deal with it.[9] Shaara artfully reminds us that this is the same judicial system that Adams struggled to protect the integrity of, at great personal expense, in the Massacre trial. It is also through the *Gaspee* incident that Shaara introduces a second theme of his book: the rebellion was a direct result of British arrogance and ignorance.

Through the characters of Lieutenant General Thomas Gage and Massachusetts Governor Thomas Hutchinson, Shaara portrays the British government as a frustrated parent dealing with an unruly teenager. While both

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6. SHAARA, *supra* note 1, at 47-54.
7. WHEELER BECKER, THE AMERICAN PAST (1990).
8. SHAARA, *supra* note 1, at 88.
9. *Id.*

Gage and Hutchinson have close ties to the colonies, (Hutchinson is American born, and Gage is married to an American), both fail to soften the British heavy-handed dealings with the colonies. Rather than serve as educator, teaching the nobility about the differences and idiosyncrasies of American culture, Hutchinson falls into a battle of wills with the rebels[10] that, like any poor parent insecure in his role, Hutchinson is destined to lose. As a result, Hutchinson loses the necessary respect a leader must have to be effective.

It is through the character of Benjamin Franklin that Shaara develops his theme on British arrogance on the opposite side of the Atlantic. He first takes the reader along on Franklin's trip to Ireland. On this trip, Franklin sees the pervasive "Let them eat cake" mentality of the British nobility towards Irish peasants and house servants. Shaara uses Franklin to show how much the colonies have grown away from their English roots, primarily in the respect for the role of the common man. Next, he portrays a nobility publicly outraged that Franklin would invade the privacy of another's mail, while this same nobility glibly reviews each and every piece of Franklin's personal correspondence. Franklin, who consistently receives mail with the seal broken, acquires the personal correspondence of Governor Hutchison from the estate of a deceased English gentleman. Franklin covertly provides these letters to the patriots in the colonies, who publish them. Franklin's time in England climaxes with his personal humiliation, as a result of this breach of privacy, at the hands of the British lords in front of parliament in a riveting scene. In it, you see a dramatic role reversal, as Franklin becomes parental, and the nobility becomes the unruly and petulant children.[11] The dialogue of the British contains the whiny, affronted air one would expect from a toddler, while Franklin calmly sits, patiently listening and maintaining personal decorum despite the attacks.

The Ben Franklin character is also evidence that Shaara has held true to his stated ideals. In the introduction, Shaara discussed his goal to show the founding fathers as realistically as possible. He wanted to avoid both the historical deference they had received and the nouveau approach of emphasizing only the sensational and shameful. Shaara shows both Franklin's strengths as a gifted statesmen and scholar, and weaknesses in his personal life. The interplay between Franklin and his loyalist governor son was profound. The reader was left to decide who possessed the greater

10. *Id.* at 104.
11. *Id.* at 238.

fault in their relationship. Shaara did an excellent job of showing the humanity of all his characters without sensationally tarnishing their heroic acts.

The third theme of this novel is the battle of John Adams versus Sam Adams to control the soul of the rebellion. On the one hand is John Adams, the lawyer dedicated to achieving justice, who looks at rebellion as a last resort to achieve that goal. On the other is his cousin, Sam Adams, an opportunist and conspirator, for whom independence is the only goal. At the beginning they are almost at odds with one another, with John Adams stealing much of the thunder from the Massacre by his decision to defend the British officer. After the *Gaspee* incident, John Adams reluctantly allies himself with Sam in order to protect the law he so loves.[12] By the end of the novel, it is John Adams who has become more of the firebrand at the Continental Congress, now virtually espoused to Sam in all issues. However, despite the transition, Shaara is careful to show that John Adams's motivation never changes. His quest remains justice, but he becomes more radical as his belief in the goodness of the British government fades to nothingness.

Rebellion also contains the battlefield drama that readers have come to expect from all the Shaara family works. With characters like George Washington and Joseph Warren, Shaara takes the reader through the battles of Lexington/Concord, Bunker (Breed's) Hill, and Dorchester Heights. Also through Washington, he explores the struggles of a commander forced into an unfamiliar command, with a staff of mostly strangers and with no clear mission. While each battle was clearly presented and obviously pivotal to history, readers may be surprised to find themselves considering the battles as secondary events. One gift from *Rebellion* is that the reader will grow to understand how the revolution was fought more in the streets, meeting houses, and bars of cities like Philadelphia, Boston, Charleston, and New York than on any battlefield.

While most readers have heard of *Common Sense*, and know that Thomas Paine wrote it, few have probably ever read the document or understood the immensity of its impact. Shaara shows how *Common Sense* educated the masses in the philosophy of the revolution and caused them to accept the new paradigm of individual rights. Through the character of Adams, Shaara showed how the act of questioning the divine right of kings, a concept that has become the birthright of every American, was

12. *Id.* at 94.

incomprehensible at that time. John Adams's transition is further shown by his reaction to the pamphlet. By 1775, he praised the words of Paine, while in 1770, he would have thought them heretical.

The final quarter of the book discusses much of the interplay of the continental congresses. The John Adams transformation is complete, and he is the firebrand the rebels rally around when discussing independence. Shaara uses the Continental Congress to illustrate that even when independence had become the clear goal, the means remained far more important than the end. As always, Adams (and most of the subsequent signers) was dedicated to doing moral and ethical right. Even after open hostilities, the majority of the Continental Congress still favored a peaceful re-unification with Britain. The book then closes with the Declaration of Independence. It is the final scene, however, that holds another profound lesson for many readers.

The book's audience may have read about the importance of the Declaration of Independence to Washington and his men, and simply accepted it as fact, without ever truly understanding why. Shaara examines it from a soldier's perspective.[13] For months these soldiers had been away from home, fighting an enemy that was stronger, better trained, and better armed. And yet, after the Declaration of Independence they gained something the British troops never had the entire war: they now had a defined goal. Giving a soldier a clear mission has always been the first step to achieving victory.

The greatest strength of this novel is clearly its character development. From the tangential characters, like Private White, to the pivotal leaders, like John Adams, the reader is able to see into the minds and hearts of each person. In addition to John Adams, the characters of Benjamin Franklin, Lieutenant General Thomas Gage, Governor Thomas Hutchinson, and General George Washington were especially well developed. Shaara developed characters less with dialogue, as many writers do, and more with commentary on their personal thoughts. This is a result of Shaara's goal to keep all quotations accurate.[14] The character of Samuel Adams is the exception to otherwise excellent character development.

While the novel clearly focuses on John Adams and his role in the revolution, it does so at the expense of Sam Adams. Despite the constant

13. *Id.* at 476.
14. *Id.* at vii.

reappearance of Sam Adams throughout the story, the reader never learns more about his inner thoughts and emotions. The reader is left with an over-simplistic perception that Sam Adams was an amoral activist for whom revolution was a goal in and of itself. Shaara fails to explain Sam Adams's ardent fervor.

Another great strength of *Rebellion* is the historical accuracy shared by all Shaara novels. The amount of research Shaara put into this work will be obvious to any reader motivated by *Rebellion* to learn more about this historical era. Despite restricting most of the plot and dialogue to conform to actual history, Shaara ensures that the flow and message of the novel do not suffer.

Rebellion is an excellent book for judge advocates desiring to learn more about the role of a dedicated attorney, John Adams, in the formation of our nation. In addition, it gives a soldier-lawyer rare insight into the hearts and minds of soldiers on both sides of the conflict. From Private White to Generals Gage and Washington, *Rebellion* shows how critical a clear mission is to all levels of soldiers.

Shaara wrote *Rebellion* to demonstrate that the underlying themes of the revolution are still relevant to the United States today. The author's unstated advice is to remember the ignorance and arrogance that led to Britain's downfall as the premier world power, and to remember how motivating perceived injustice may be. The British learned, to their loss, that they did not hold a sole and proprietary interest in the concept of justice. The lessons of the Revolution serve as sage advice as the United States currently struggles with her own potential *Gaspee*, the World Trade Center and Pentagon terrorist's attacks. Granted, these tragedies are infinitely more serious than the *Gaspee* attack, but like that incident was for the British, America's reaction will be far more important in the annals of history.

Rise to Rebellion opens new windows into the souls and events that led to the age of revolution in the United States. There is a promised sequel to cover the second part of the era, and I certainly look forward to it.

MARBURY V. MADISON: THE ORIGINS AND LEGACY OF JUDICIAL REVIEW[1]

REVIEWED BY MAJOR STEPHEN M. SHREWSBURY[2]

It is emphatically the province and duty of the judicial department to say what the law is.[3]

But what *is* the law? That question forms the constant undercurrent that runs throughout William Nelson's well-written and fascinating narrative about the facts and legacy of one of America's most important Supreme Court cases. The case, readily recognized by every student of the law or American history, established the beginning of one of our most important legal principles—the axiom that the Supreme Court has the final word on whether actions by the other federal branches and States complied with the requirements of the Constitution.[4]

This book has two apparent and distinct purposes. On the one hand, the fast-paced and interesting historical review moves through the beginning and development of judicial review. To that end, Nelson quickly establishes his thesis that Chief Justice John Marshall,[5] in creating judicial

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1. WILLIAM E. NELSON, *Marbury v. Madison*: The Origins and Legacy of Judicial Review (2000).

2. Judge Advocate, United States Air Force. Written while assigned as a student, 50th Judge Advocate Officer Graduate Course, The Judge Advocate General's School, United States Army, Charlottesville, Virginia.

3. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803). *Marbury* involved an action by William Marbury and others to seek a writ of mandamus directly from the Supreme Court forcing the new Secretary of State, James Madison, to deliver to them their commissions as justices of the peace. The former President, John Adams, had signed these commissions before leaving office. *See* NELSON, *supra* note 1, at 57.

4. *See* Cooper v. Aaron, 358 U.S. 1, 18 (1958) (citing *Marbury* before stating that "the federal judiciary is supreme in the exposition of the law of the Constitution").

5. 1755-1835; Chief Justice of the United States, 1801-1835. Marshall was born in Fauquier County, Virginia, as the oldest of fifteen children. Marshall married sixteen-year-old Mary Ambler in 1783, following his service with George Washington in the Revolutionary War and admission to the Virginia Bar in 1780. He served in Virginia politics before going to France at the behest of President Adams in 1797. He was elected to the House of Representatives in 1799 before being nominated as Secretary of War and then immediately as Secretary of State, in 1800. Six months later, President Adams nominated Marshall as Chief Justice of the Supreme Court, and he was confirmed unanimously in January 1801. *See* The John Marshall Foundation, *Biography of John Marshall, at* www.vba.org/jmfinfo.htm (last visited July 10, 2002).

review, carefully drew a distinction in *Marbury* between legal and political decision making.[6] He attempts to explain the case's influence then and now by first drawing the reader into the eighteenth century American world in which John Marshall lived. He then examines the details of *Marbury* and the subsequent spread of the new power of judicial review. According to Nelson, it was a power that evolved from drawing a line "between the legal and political—between those matters on which all Americans agreed and which were fixed and immutable and those matters which were subject to fluctuation and change through democratic politics," to the power of today's courts to make policy choices.[7]

But underlying this entire historical discussion is the book's second purpose—Nelson's use of *Marbury* as a foundation of support for judicial activism. Glimpses of this underlying theme appear throughout the book, but do not become clear until the last chapter. Eventually, the reader learns that, in Nelson's view, the power of today's courts to make policy choices is well deserved because "[o]nly judges are sufficiently insulated from majority prejudices to be trusted."[8] To support his reasoning, Nelson posits that in early American society, judges and juries said what the law was by following the "consensus" views of society. Consequently, today's judges should use the same standard of lawmaking as they make policy choices based on societal consensus.

Of course, the source of that consensus is very different today, but that is not the issue. What is important is the idea that judges say what the law is based on societal consensus—a standard used then, and one that should be used today. After all, as Nelson explains, John Marshall himself relied on consensus in deciding part of the *Marbury* opinion when he found "that Marbury had a right to his commission because, by a consensus of American lawyers, a commission for office was a property right and because, by the consensus of the American people, property was a fundamental, legal right that trumped the political will of the popular majority."[9] Whether the reader ultimately agrees with the author's use of *Marbury* to sustain his enthusiastic support of judicial activism by courts today, he succeeds in helping the reader understand some of the reasons why courts slowly

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6. *See* NELSON, *supra* note 1, at 8.

7. *Id.*

8. *Id*. at 124.

9. *Id*. at 119. Marshall opined that Marbury's commission, as evidence of his appointment, was his property and, therefore, the appointment vested him with legal rights that the law protected under the Constitution. *See id*. at 55-62.

evolved from strictly limited judicial review to today's unabashed making of political policy choices.

Nonetheless, long before the book reveals Nelson's viewpoints on the proper role of the judiciary today, it moves in whirlwind fashion as a fascinating historical review, in which the reader is first carried back into pre-American colonial history. To help give the book its flowing style, Nelson uses a bibliographic essay instead of endnotes, which may be difficult for the reader seeking more in-depth discussion of source material. Yet, with a view to establishing American life in the colonies as an important foundation to the coming doctrine of judicial review, Nelson deftly draws the reader's attention to various aspects of colonial life that provided the floor upon which the founding fathers built our constitutional republic.

It was within this world that John Marshall grew and lived. The historical portion of the book is by far the most interesting as Nelson adeptly paints a backdrop for the development of judicial review. He discusses the ties between the social and legal development of eighteenth and nineteenth century America based on societal consensus, and he explores John Marshall's life before the *Marbury* decision.

From where did consensus in early American society arise? According to Nelson, the social structure of the mid-eighteenth century British North America was rooted in localities. The courts and government were not thought of as institutions for policy change—no one really thought things could change. Life went on as usual, and "[n]o one in government needed to make choices about the direction that law, government, and the society ought to take."[10] Thus, in American society during that period, law was determined by juries, which had the power to ignore the instructions of judges and make whatever decisions they wished. "[T]he law-finding power of juries suggest[ed] ineluctably that jurors came to court with shared preconceptions about the substance of the law."[11] Thus, if juries "mirrored the . . . landholding . . . population," then "perhaps a body of shared ideas about law permeated a large segment of the population."[12] In

10. *Id.* at 15.
11. *Id.* at 21.
12. *Id.* at 22.

sum, the "consensus style of government was known to most mid-eighteenth-century white, male Americans on a routine, day-to-day basis."[13]

Having provided a basis for consensus-style lawmaking in American colonial history, Nelson states that consensus-style government became "unhinged" at the end of the French and Indian War as the revolutionary struggle split communities as they identified with the Tories or patriots.[14] In the early 1790s, the line between believers in popular sovereignty and believers in supreme fixed principles was plainly drawn, pitting the will of the people against fixed principles of law.[15] The Republicans feared that the "Federalists would subvert republican liberties and rule autocratically."[16] The Federalists feared that the "conferral of power upon Republicans would subvert morality and lead to violence and anarchy."[17]

With that background, Nelson begins the most fascinating chapters of the book, detailing the life of John Marshall and his *Marbury* decision. It is through understanding John Marshall's development into a man of consensus that the reader begins to understand what motivated the man who would change the course of American judicial history. Marshall came from a shared common ancestry with Thomas Jefferson and other Virginia families. Having served in the Continental Army under George Washington for four years, including at Valley Forge, he became a committed nationalist and a consensus builder.[18] As a spokesman for the Federalist forces during the Constitutional Convention, he was in charge of designing the judiciary article.

Known as a party moderate, Marshall won a seat in Congress as one of the few Federalists from the South, partly because he opposed the Alien and Sedition Act.[19] Marshall was extremely loyal to President Adams, and though he greatly distrusted Jefferson, he remained neutral during the Jefferson-Burr election contest.[20] Marshall became Chief Justice less than one month before that election, with the Jeffersonian Republicans supporting Marshall because of his moderate stand and rebellion against party dis-

13. *Id.* at 27.
14. *Id.* at 28-30.
15. *Id.* at 37.
16. *Id.* at 39.
17. *Id.*
18. *Id.* at 42-43.
19. The Federalists had supported the Act, which made newspaper criticism of the Adams administration a criminal offense. *See id.* at 46.
20. *Id.* at 49-50.

cipline. Thus, Marshall came to mutual respect with Jefferson, and despite the bitter fight over the change of power from the Federalists to the Republicans, was "no fanatic."[21]

With Marshall's world fresh in the reader's mind, Nelson explains the tightrope Marshall walked in his brilliant *Marbury* opinion. It was a decision neither the Federalists nor Republicans could criticize, but which, at the same time, established judicial review by the Supreme Court as a fundamental principle. Marshall exercised and solidified the Court's new power just a few days later in *Stuart v. Laird*[22] by striking down an Act of Congress for the first time.

Here the book moves as a fast-paced historical review. The lame duck Congress during the end of President Adams's term of office passed the Judiciary Act of 1801, greatly expanding the size and power of federal courts. This Act upset the compromises that had been reached in designing the Sixth and Seventh Amendments.[23] The anti-Federalists designed these amendments to the Bill of Rights because they were aware of the fact- and law-finding powers of juries,[24] and they feared such powers would be transferred to federal judges. This would "weaken the power of the states to nullify federal policy."[25] Thus, the new Congress quickly passed the Judiciary Act of 1802, repealing the 1801 Act. Soon after, new Chief Justice Marshall was faced with two cases that, if decided incorrectly, would create a Supreme Court that the newly elected Jefferson feared.[26]

Nelson convincingly asserts his thesis that John Marshall carefully drew a distinction between legal and political decision making—a distinction that runs throughout the *Marbury* opinion.[27] Marshall, the consensus

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21. *Id.* at 53.

22. 5 U.S. (1 Cranch) 299 (1803).

23. NELSON, *supra* note 1, at 57. Among other important protections, the Sixth Amendment guarantees a right to a jury trial in criminal cases and the right to have the jury drawn from the district where the crime occurred. The Seventh Amendment guarantees a right to a jury trial in civil cases involving amounts greater than $20, and it guarantees that no fact tried by a jury could be "re-examined in any Court of the United States, [other] than according to the rules of common law." U.S. CONST. amends. VI, VII.

24. *See supra* text accompanying notes 11-13.

25. NELSON, *supra* note 1, at 55.

26. Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803); *Stuart*, 5 U.S. (1 Cranch) at 299. Decided differently, Marshall could have allowed Congress to give the Supreme Court powers in the Judiciary Act of 1801 that the Constitution did not allow, that is, original jurisdiction to issue writs of mandamus, as well as the authority to strike down the Judiciary Act. Such a result could have led to a constitutional crisis between Marshall and Jefferson.

builder, compromised in both *Marbury* and *Laird*; courts would protect legal rights, but refrain from adjudicating political questions. In these companion cases, therefore, Marshall tried to balance popular will with legal principle, and he tried to distinguish "between the domain of the law and the domain of politics."[28]

Nelson is convinced that judicial review took shape because Marshall believed that the principles underlying constitutional government were non-political. In *Marbury*, "the Court evoked the Revolutionary generation's assumption that the people, acting as a unitary body . . . had incorporated basic generally agreed-upon principles of right into their Constitution. The Court thereby reverted to something like the governance by consensus techniques of its eighteenth century predecessors."[29] Accordingly, while the *Marbury* decision prevented the courts from engaging in judicial activism, it laid the foundation for future courts to begin the judicial review process. It was a process relatively uncontroversial then, and very different than the social policy making that courts engage in today.[30]

While the book's discussion of the details of *Marbury* is absorbing, its post-*Marbury* historical discussion is too cursory and conclusory. Nelson's underlying focus on his core theme—that courts act based on consensus—eventually relies on *Marbury* as an important basis for his justification of judicial activism today. But getting there is problematic because Nelson begins to discuss post-*Marbury* cases involving judicial invalidation of legislation as cases mainly involving "takings." The reader flounders while trying to understand how these takings cases relate to Nelson's theme. Although the relationship becomes clear later in the book, it gives this section, while historically interesting, a somewhat aimless and dull quality. Once Nelson explains the relevance of the takings cases, the reader wants to return to the previous section with a more intense focus. Accordingly, a few guiding paragraphs, followed by a fuller discussion, may have been helpful.

According to Nelson, judicial review involving judicial invalidation of legislation was rare in the period between *Marbury* and the infamous *Dred Scott*[31] case. Courts rarely invalidated significant legislation, except

27. *See* NELSON, *supra* note 1, at 8.
28. *Id.* at 59.
29. *Id.* at 64.
30. *See id.* at 75-76.

in property takings cases. Judicial review was mainly targeted at "the possibility that faithless legislators might betray the trust placed in them by the people,"[32] especially with regard to their inherent constitutional right to property. *Dred Scott*, which partially set the stage for the Civil War, focused on the property rights aspects of the case's facts to invalidate the Missouri Compromise.[33] Thus, in the Court, claims of property rights in slaves and economic liberty were pitted against the fundamental liberty notions of human beings. The claim of property rights won the day.[34] Later, this relentless focus on property and economic liberty saw new state "legislative efforts to improve working conditions of laborers founded on the rocks of economic liberty."[35]

Nonetheless, courts began to see judicial review not as a device for protecting the people against their government, but for protecting minorities against majorities. While rich property owners were the original "minorities" protected through judicial review, judicial protection eventually became "a means for sectional and political minorities or individuals lacking control of the legislative process to obtain reconsideration of the legislature's decisions and overturn the legislature's political judgments."[36]

In this section, the book's second purpose and Nelson's theme fully emerge. The tone of the writing quickly evolves from a historical narration of Nelson's conclusions about *Marbury*'s influence to a forceful advocacy for judicial activism as the only trustworthy means to protect minorities from majoritarian legislators. In Nelson's view, the courts' focus on legal rights, especially in property, changed in the late 1930s because of fear of totalitarian governments and an underlying loss of faith in popular government and institutions of democracy. The focus shifted to support of economically weak groups so they could stand against stronger opponents.[37] Nelson tries to strengthen his position in this section of the book by using

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31. Scott v. Sanford, 60 U.S. (1 How.) 393 (1856) (commonly called *Dred Scott* after the name of the Petitioner).

32. NELSON, *supra* note 1, at 83.

33. *Id.* at 88.

34. *See Scott*, 60 U.S. at 454 (holding that Dred Scott was not a "citizen" of Missouri in the sense used by the Constitution).

35. NELSON, *supra* note 1, at 90.

36. *Id.* at 93.

37. *Id.* at 99.

a "string of quotations" writing style to make his point, without placing the quotations in any context—a style that was intellectually annoying.[38]

According to Nelson,

> *Our* task is to comprehend the significance for judges and judicial review of this change in the understanding of the essential task of just government . . . . Democratically elected legislators and elected executive officials, who are responsible to popular majorities, cannot be trusted to protect minorities from those majorities. Judges with life tenure can be.[39]

These statements astonish the reader, considering the vast amount of legislation that has been passed protecting various minority groups over the past several decades.[40]

Nelson argues that *Marbury*'s distinction between law and politics still pulls courts to find "legalistic" grounds for its decisions. But, in his view, "the essential task of government [today] is not to establish the will of the majority but to protect the integrity and civil liberties of minorities. Legislative majorities are too self-interested to be trusted with that task."[41] Accordingly, judges must use their ad hoc judgments and intuition about good social policy in the absence of clear rules.[42]

Without justifying these statements, Nelson moves on to discuss the worldwide spread of judicial review. If Nelson had continued to focus on the historical development aspects of the book, this history would be interesting. Yet, he immerses the reader in his emerging arguments. Consequently, this new historical discussion seems superfluous and breaks the flow of the book.

Fortunately, Nelson returns to his theme in the book's concluding chapter. He cogently details original intent and various other arguments related to judicial activism. Ultimately, he provides better arguments for judicial restraint than judicial activism. Nonetheless, he concludes that Marshall in *Marbury* provided authority to the Supreme Court to "identify

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38. *See, e.g., id.* at 97 (using eight short quotations in a single paragraph).

39. *Id.* at 101-02 (emphasis added).

40. *See, e.g.*, The Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241. This act was part of a series of legislative reforms protecting minority groups.

41. NELSON, *supra* note 1, at 103.

42. *Id.*

and enforce, even against majoritarian legislation, values widely shared by the people as a whole."[43] But one is left wondering, what would prevent the majority legislators from enforcing values that the people as a whole share?

In the end, Nelson uses *Marbury* to support his idea of consensus-based judicial decision making. He argues that *Marbury* used consensus in the first part of the opinion, and that is what judges are doing today in articulating the societal consensus against discrimination. For Nelson, such consensus is a second form of "law" relied upon by courts. This consensus, the publicly proclaimed values of which the community agrees, was articulated by juries in the past, but is defined by "societal leaders and the media today."[44] Unfortunately, Nelson puts forth this astounding claim of media-created law as a conclusion without nearly enough supporting discussion.

While acknowledging that *Marbury* drew a definitive legal and political line, Nelson concludes that the case supports his views because part of its reasoning was based on societal consensus regarding property rights during the time the Constitution was created. He forcefully opines that only judges can be trusted to implement and protect the majority consensus, which accepts that discrimination is evil and unjust. Whether one agrees or not, this provocative argument ends an excellent book for both the lawyer and non-lawyer alike. The reader is left with a solid understanding of the development of judicial review and an even firmer understanding that—while *Marbury* may stand as the rock upon which rests the judicial power to decide "what the law is"—the ultimate question of "what is the law" remains a matter of considerable dispute.

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43. *Id.* at 119.
44. *Id.* at 122.

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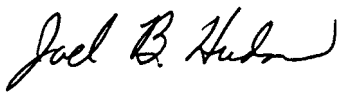

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